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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

W.B. SAUNDERS COMPANY and CBS EDUCATIONAL AND PROFESSIONAL PUBLISHING, a Division of CBS Inc.,

Petitioners,

v.

ADELINE M. BRUNO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN J. MCALEESE, JR.*
JOHN H. WIDMAN
Suite 240—Executive Terrace
455 South Gulph Road
King of Prussia, PA 19406
(215) 337-4510

Attorneys for Petitioners

MCALEESE, MCGOLDRICK & SUSANIN, P.C.
Suite 240—Executive Terrace
455 South Gulph Road
King of Prussia, PA 19406
(215) 337-4510

Of Counsel

* *Counsel of Record for Petitioners*

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the court below erred in holding that, when an employer favors a person under 40 over a plaintiff who is 40 or older, merely questioning the business judgment of that employer *always* will support a finding of intentional discrimination in violation of the Age Discrimination in Employment Act?[1]

II. Whether the court below erred in holding that statistical analyses of employment decisions which analyses fail to control for *any* of the special qualifications required for the positions analyzed are admissible in a trial by jury of an individual disparate treatment employment discrimination case?

III. Whether the court below erred in holding that an employer's written, unconditional offer of a superior or a substantially equivalent job which offer expressly repudiates a prior conditional offer does not supersede the prior offer and thus toll the accrual of back-pay liability under *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982)?

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[1] In 1988, this Court granted *certiorari* to the United States Court of Appeals for the Third Circuit to review essentially the same question. *Harbison-Walker Refractories, Inc. v. Brieck*, 485 U.S. 958 (1988), *granting certiorari*. The question presented in *Harbison-Walker* is quoted verbatim *infra*, p.7. At the conclusion of oral argument in *Harbison-Walker*, a Justice observed in referring to petitioner's argument: "I'm sorry that that wasn't the question you presented to us when you asked us to take this case. The question presented [a]s set forth in your petition ... is an interesting question. What you've just been talking about isn't." (A-62). Thereafter, the petition in *Harbison-Walker* was dismissed as improvidently granted. ____U.S. ____, 109 S.Ct. 546 (1988) (White, J. dissenting).

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v.

ADELINE M. BRUNO,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

W.B. Saunders Company and CBS Inc. petition this Court to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 14, 1989.

OPINIONS IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit relating to the judgment of which review is sought is reported officially at 882 F.2d 760. That decision affirmed in part a judgment of the United States District Court for the Eastern District of Pennsylvania upon the verdict of a jury. The opinion of the district court relating to the denial of a judgment notwithstanding the verdict or a new trial is not officially reported.

JURISDICTION OF THIS COURT

The judgment of the Third Circuit was entered on August 14, 1989. On September 8, 1989, a timely petition for rehearing and suggestion that rehearing be *in banc* was denied.

This Court has jurisdiction by virtue of 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

Section 4(a)(1) of the Age Discrimination in Employment Act ("ADEA") provides:

> (a) Employer practices. It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . .

29 U.S.C. § 623(a)(1) (1967).

Petitioners seek review of a judgment of the Third Circuit which affirmed by a 2-1 vote a judgment of the district court upon a jury verdict for Adeline Bruno on her claim under the ADEA but reduced that judgment from $850,000 to $500,000.[2]

The district court had jurisdiction over Bruno's claim by virtue of 28 U.S.C. § 1331 (1980).

Bruno was employed by W. B. Saunders Company ("Saunders"), which was a unit of CBS Educational and Professional Publishing, a division of CBS Inc. ("CBS"), until May, 1986, when her job was eliminated as part of a reduction-in-force resulting from a consolidation of certain functions being performed both by Saunders employees in Philadelphia and CBS employees in New York. Saunders was and is a publisher of medical textbooks and periodicals ("clinics").

In January, 1985, Bruno applied for the manager's position in the Clinics Fulfillment Department at Saunders (hereinafter "Clinics job"). Nine other Saunders employees applied for that job. Bruno was 46 years of age. The ages of the other applicants were: 24, 25, 26, 36, 36, 40, 41, 48, and 49 (avg. of ten applicants: 37.1).

Saunders selected Beverly Dietrich (age 36), the acting manager of the Clinics Fulfillment Department, for the Clinics job.

In this action, Bruno claims that she was not selected for the Clinics job because of her age.

At trial, Bruno did not offer any evidence tending to prove that either her age or the age of any other applicant was considered in the decisionmaking process for the Clinics job. Rather, she offered only the bare statistic of her age (46)

[2] The jury awarded Bruno $75,000.00 in back pay and $350,000.00 in front pay. The jury doubled each award as liquidated damages upon its conclusion that petitioners' conduct was willful. The Third Circuit reversed the award of liquidated damages on front pay and accordingly reduced the judgment to $500,000. 882 F.2d at 772.

and Dietrich's age (36). Misconstruing this Court's decisions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the court below held that the statistic of Bruno's and Dietrich's ages alone "was sufficient to support an inference of age discrimination" simply because Bruno was within the protected class and Dietrich was not. 882 F.2d at 765.[3] In view of this, the court below further ruled that Bruno's burden of proving that her age motivated the challenged decision was limited to offering evidence sufficient to discredit Saunders' nondiscriminatory explanation for that decision. 882 F.2d at 766.

In explaining why Bruno was not selected, Saunders introduced evidence that the decisionmaker perceived her attitude toward the Clinics job to be half-hearted. 882 F.2d at 765. Saunders further explained that Dietrich was selected because of the quality of her performance as acting head of the Clinics department during the three months intervening between the initial vacancy and her selection. 882 F.2d at 765.

As summarized by the court below, Bruno attacked the credibility of this nondiscriminatory explanation by (i) testifying that her attitude was not half-hearted; (ii) pointing to testimony that the decisionmaker was told after Bruno's interview that Bruno wanted the job;[4] and (iii) offering testimony from two other employees of Saunders that, in their opinion, Dietrich did not show ability in some aspects of the Clinics job. Those employees were not Dietrich's supervisors, and they did not work in her department. 882 F.2d at 766.

The court below concluded that this evidence, which merely questioned the decisionmaker's appraisal of the attitudes and qualifications of the candidates and thus *the busi-*

[3] According to the court below, this constituted the "*prima facie* case" which is the first part of its adaptation of the *McDonnell Douglas* formulation to an ADEA case.

[4] Although not mentioned by the court below, those witnesses also testified that Bruno's attitude toward the interview process was half-hearted and somewhat belligerent.

ness judgment of Saunders, was sufficient to discredit Saunders' non-discriminatory explanation and to sustain Bruno's verdict. 882 F.2d at 766.

Bruno also offered statistical analyses—not relied upon by the court below in sustaining the verdict—of various employment decisions made by Saunders prior to and during its reduction in force. These statistical analyses did not control for *any* of the *special qualifications* which were required for the various positions analyzed (e.g., medical editor, copy-writer, marketing manager, printer, accountant, computer programmer). For that reason, prior to trial Saunders filed a motion *in limine* attacking that evidence as irrelevant[5] and highly prejudicial, and it renewed that objection at trial in a motion to strike after cross-examination of Bruno's expert had established that defect in the record.

Over a strong dissent, the majority below concluded: "Even though [the statistical evidence] does not account for the minimum objective qualifications of the positions into which transfer or promotion was possible, we conclude that the studies are 'relevant.'" 882 F.2d at 767. The majority implied that Bruno's studies would not have been admissible in a pattern or practice case because of their failure to control for those special qualifications but held that the standard for admissibility is more lenient in an individual disparate treatment case.

The dissent sharply criticized the majority for directly contradicting repeated decisions of this Court[6] and for the

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[5] In support of that proposition, Saunders offered its expert's report on Bruno's studies. That report demonstrated that, even without controlling for qualifications, many of Bruno's studies did not produce statistically significant results when standard tests of statistical significance were performed. It also demonstrated that the disparities reported in Bruno's remaining studies were eliminated when qualifications were considered.

[6] *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974); *Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977); *Bazemore v. Friday*, 478 U.S. 385, 400 n.10 (1986); *Watson v. Fort Worth Bank & Trust*, 487 U.S. ____, 108 S.Ct. 2777, 2790 (1988); *Wards Cove Packing Co., Inc. v. Atonio*, ____ U.S. ____, 109 S.Ct. 2115, 2121-22 (1989). *See also, City of Richmond v. J. A. Croson Co.*, ____ U.S. ____, 109 S.Ct. 706, 725 (1989).

conclusion that such studies will tend to prove the existence of a pattern or practice of discrimination if offered in support of an individual disparate treatment case but will not do so if offered in support of a class action pattern or practice case. In concluding on this issue, the dissent warned: "The door is now open in this circuit to the admission of plainly irrelevant statistical evidence in individual disparate treatment cases." 882 F.2d at 776.

In October, 1985, prior to Bruno's layoff and after she had filed a charge of age discrimination against Saunders relating to the Clinics job, CBS offered Bruno a position (the "Bellmawr job") which ultimately was found by the jury to be *superior or substantially equivalent* to the Clinics job. At first, Bruno accepted the Bellmawr job, but soon thereafter rejected it. 882 F.2d at 763 n.12. Bruno testified that she rejected the Bellmawr job because she was told by her immediate superior at the time the job was first offered to her that "it would be expected of me to drop my [EEOC] claim if I accepted [the Bellmawr job] . . . and I took that to mean that—that you better do it or they're gonna' find a way to get rid of you." 882 F.2d at 770. After her rejection of the Bellmawr job, Bruno received a written memorandum from CBS renewing that offer and expressly repudiating any condition on her acceptance of the position. 882 F.2d at 770-771. She rejected that offer and commenced this litigation.

The court below split on the question of whether Bruno failed to mitigate her damages in rejecting the Bellmawr job. The majority concluded that Bruno's testimony respecting the prior conditional offer, *without more,* was sufficient to allow the jury to find that the subsequent written offer was not made in good faith despite the fact that it clearly and unambiguously repudiated the alleged prior condition. The dissent argued that the majority's holding promotes the rejection of an unconditional offer of at least a substantially equivalent job whenever the claimant fears retaliation, thereby frustrating the policy of bringing employment discrimination to an end through voluntary compliance announced by this Court in *Ford Motor Co. v. EEOC*, 458 U.S. 219, 229-230 (1982). On this basis, the dissenter voted for entry of judgment for Saunders and CBS.

I. THIS CASE SQUARELY PRESENTS A SUBSTANTIAL QUESTION UNDER THE ADEA WHICH HAS NOT BEEN AND NEEDS TO BE RESOLVED BY THIS COURT NOT ONLY BECAUSE OF ITS VITAL IMPORTANCE BUT ALSO BECAUSE OF THE CONFLICT AND CONFUSION WHICH THAT QUESTION HAS CREATED AMONG THE CIRCUITS

In *Harbison-Walker Refractories, Inc. v. Brieck*, 822 F.2d 52 (3d Cir. 1986), *cert. dismissed*, ____U.S.____, 109 S. Ct. 546 (1988) (White, J. dissenting), this Court granted *certiorari* to the Third Circuit to consider the following question under the ADEA:

> Whether a plaintiff who alleges intentional discrimination can survive summary judgment merely by questioning his employer's business judgment, without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate?

Petition for a Writ of Certiorari, *Harbison-Walker Refractories, Inc. v. Brieck, supra.*

This question was not resolved in *Harbison-Walker* because of the dismissal of the petition following oral argument.

The instant petition, in Question I hereof, *squarely presents* the same substantial question under the ADEA, a question which is not only of vital importance in the administration of the ADEA but also as to which the circuits are in hopeless conflict and confusion.

The decision of the court below, by perverting this Court's rulings in *McDonnell Douglas* and *Burdine*, unquestionably transforms the ADEA from a vehicle intended to protect against the intentional use of age in employment decisions into a vehicle for second-guessing an employer's business judgment. The holding of the court below—that a jury *always* may find intentional age discrimination when it does not believe an employer's explanation for preferring an individual under 40 years of age over an individual 40 years

of age or older—establishes a minimum evidentiary burden which has no basis in either logic or experience. While it may be true that in some specific context an employer's unexplained rejection of an individual over 40 in favor of an individual under 40 may give rise to an inference of age discrimination, the court below exceeded the bounds of logic and reason in concluding that such facts *always* will support a reasonable inference that age was a motivating factor in the challenged decision.[7] For that reason, the Sixth Circuit has rejected uniform application of the *McDonnell Douglas* formula in ADEA cases. *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940 (6th Cir. 1987) and cases cited therein.[8]

Because the *prima facie* case defined by the court below often, as in this case, will not reasonably give rise to an inference that age motivated the challenged decision, a plain-

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[7] In essence, the court below holds that because Congress established a protected class, it is *always* reasonable to infer age discrimination when an individual within that class is rejected in favor of an individual outside that class. 882 F.2d at 765. Surely such an unreasonable conclusion could not have been intended by Congress when it enacted the ADEA. Understandably, the court below did not offer any authority for this irrational conclusion.

[8] In an earlier case, the Sixth Circuit distinguished ADEA cases from Title VII cases noting:

> [t]he progression of age is a universal human process. In the very nature of the problem, it is apparent that in the usual case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in. This factor of progression and replacement is not necessarily involved in cases involving the immutable characteristics of race, sex, and national origin. (citations omitted)

Laugesen v. Anaconda Co., 510 F.2d 307, 313 n.4 (6th Cir. 1975).

In *Skelton v. ACTION*, 668 F. Supp. 25 (D.D.C. 1987), the court granted summary judgment to an employer in an ADEA case on the ground that "the mere age differential between [the plaintiff] and the selectee" combined with some evidence to discredit the employer's explanation was not enough to create a triable issue of fact. 668 F. Supp. at 29. The court noted that a rule of law which allows a plaintiff to survive summary judgment on such evidence "would only misdirect the court's energies from an inquiry into possible discrimination to a review of the wisdom of the employer's hiring practices." *Skelton* was affirmed without opinion on appeal. No. 87-5353 (D.C. Cir., May 12, 1988); *cert denied*, ____ U.S. ____, 109 S.Ct. 1312 (February 27, 1989).

tiff who, as in this case, satisfies this thin burden and who offers some evidence casting doubt on the employer's explanation often will avoid a summary judgment, a directed verdict, and a judgment notwithstanding the verdict without having offered any evidence tending to prove that age motivated the decision. Moreover, in most cases, the plaintiff's rebuttal evidence will attack the soundness or fairness of the employer's business judgment, thereby implicitly suggesting to the jury that the challenged decision was so unsound or unfair that the nondiscriminatory explanation must not be true. Thus, the court below permits the trial by jury of the soundness or fairness of an employer's business judgment rather than whether the employer's decision was motivated by age.[9] In effect, the rule of law established by the court below improperly shifts to the employer the nearly impossible burden of proving "absence of discriminatory motive." *Bienkowski*, 851 F.2d at 1508 n.6.

The error described above is compounded by the further holding below that a jury may be instructed to utilize this three-stage artificial construct to resolve the ultimate question of whether age was a determining factor in the challenged decision.[10] Such a charge necessarily will focus the jury's entire attention on the credibility of the employer's explanation for the challenged decision. By so focusing the jury, a verdict for the plaintiff always will result when the negligible *prima facie* burden is satisfied and the jury disbelieves the employer, even though the jury may never have indepen-

[9] The Fifth Circuit has criticized the Third Circuit on this ground. *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1508 (5th Cir. 1988) (expressly rejecting the Third Circuit's adaptation of *McDonnell Douglas* to the ADEA as one that converts the ADEA "from one preventing discrimination because of age to one ensuring dismissals only for 'just cause' to all people over 40.").

The First Circuit also has rejected the Third Circuit's formulation. *Menard v. First Security Services Corp.*, 848 F.2d 281, 287 (1st Cir. 1988) (holding that a plaintiff who establishes a *prima facie* case will not prove age discrimination by "[m]erely casting doubt on the employer's articulated reason.") (quoting *Dea v. Look*, 810 F.2d 12, 15 (1st Cir. 1987)).

[10] Petitioners have not presented a separate question on this holding in view of the fact that it is a subsidiary question fairly included within the first question presented.

dently reached a reasoned conclusion that the plaintiff's age motivated the decision. Certainly the Fifth Circuit would agree with such a conclusion given its criticism of the Third Circuit's formula. *Bienkowski*, 851 F.2d at 1508 n.6. Moreover, the Seventh Circuit has reached the outrageous but correct conclusion that when its three-part formula (which is identical to the Third Circuit's) is used to decide the ultimate fact issue, "[a plaintiff can] prevail without presenting *any* evidence that age was a determining factor in the employer's motivation." *La Montagne v. Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984) (emphasis in original). Given that conclusion, one must assume that the Seventh Circuit also would agree that a jury which is instructed to use that formula will find for the plaintiff without ever having reached a reasoned conclusion that age motivated the challenged decision.

That these rulings of the court below will have a profound prejudicial effect upon employers is graphically demonstrated by the record in this case. This case was permitted to go to the jury even though the only evidence relating in any way to age was Saunders' selection of a 36 year old applicant from a pool of 10 applicants, including Bruno, whose ages were: 24, 25, 26, 36, 36, 40, 41, 46, 48, and 49. Furthermore, the jury was instructed to utilize the Third Circuit's three-part mechanism to resolve the ultimate issue of whether Bruno's age was a determining factor in her rejection.[11] The jury obviously used this mechanism to resolve that question since it requested a description of "the four *determining* factors" during deliberations. (emphasis added)

The decision of the court below also flatly disobeys this Court's admonition in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715-716 (1983) that the ultimate issue of fact in these cases—whether the plaintiff's

[11] The District Court's instructions on this issue were entirely confused, often contradictory, and ultimately in error. For example, in its last charge on this issue, the court *mandated* a finding for Bruno if the jury found that Bruno proved the *prima facie* elements and if it disbelieved Saunders' explanation.

age motivated the challenged decision—should *not* be resolved by application of the *McDonnell Douglas* formulation.

Whether or not the three-stage formula defined by the court below represents a proper adaptation of *McDonnell Douglas* to the ADEA, it is inappropriate under *Aikens* to require a trial court to make a sufficiency of evidence determination by application of that formula after the trial has concluded. *E.g., Elliott v. Group Medical & Surgical Services*, 714 F.2d 556, 564 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 2658 (1984); *Bell v. Gas Service Co.*, 778 F.2d 512, 515 (8th Cir. 1985); *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 558 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 488 (1987) (Title VII). *But see, Fite v. First Tenn. Prod. Credit Assn.*, 861 F.2d 884 (7th Cir. 1988) (sustaining plaintiff's jury verdict because he established *prima facie* case and offered evidence discrediting employer's explanation); *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061 (8th Cir. 1988) (same). Rather, a trial court must review the totality of the evidence to determine whether, under the circumstances of the case, one reasonably may infer that age motivated the decisionmaker. It is even more inappropriate under *Aikens* to instruct the jury to resolve the ultimate issue of fact by application of that mechanism. *E.g., Nelson v. Green Ford, Inc.*, 788 F.2d 205, 207 (4th Cir. 1986); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979).

Although the opinion of the court below pledges fidelity to *Aikens'* admonition, 882 F.2d at 764, its decision belies that fidelity. Indeed, the court below concluded its discussion on the issue of liability by stating: "If a 'legitimate, nondiscriminatory' reason articulated by a defendant *faced with a prima facie* case of discrimination is not the *true reason* for a failure to hire, the court may infer that the actual reason was impermissible." 882 F.2d at 765 (emphasis in original). In so concluding, the court below clearly places dispositive weight on the so-called *prima facie* case.

The holdings of the court below present this Court with an opportunity to consider squarely how, if at all, the

principles announced in *McDonnell Douglas*, *Burdine*, and *Aikens* should be adapted to fit jury trials under the ADEA. The fundamental importance of that question to the administration of the ADEA alone justifies review by this Court. The direct conflict between the holdings of the court below and this Court's opinion in *Aikens* adds substantial importance to that question in the context of this case.

Resolution of that question will have immediate importance far beyond the law of the Third Circuit, however, for in the sixteen years since *McDonnell Douglas*, application of its principles to the ADEA has left the circuit courts in hopeless disarray. While it is impossible to catalogue the extent of the conflict between and indeed *within* the circuits, it is sufficient to note that the First, Fifth, and Sixth Circuits have expressly rejected the three-part formula adopted by the Third, Seventh, Eighth, and Eleventh Circuits.[12] The Fifth Circuit's criticism in *Bienkowski* that the Third Circuit's formula allows a plaintiff to prevail without offering *any* evidence that age motivated the challenged decision and the Seventh Circuit's incredible admission to the same effect[13] provide clear proof that the conflict is square and irreconcilable, thus requiring resolution by this Court.

If the decision of the court below is left intact, employers in the Third, Seventh, Eighth, and Eleventh Circuits will have no choice but to settle claims in which a *'prima facie case'* can be made and the employer's non-discriminatory explana-

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[12] *Compare, Menard*, 848 F.2d at 287 and *Bienkowski*, 851 F.2d at 1508 (refusing to submit case to the jury if plaintiff simply establishes *prima facie* case and offers evidence attacking the credibility of the employer's explanation) *with Bruno*, 882 F.2d at 766; *Fite*, 861 F.2d at 890, *Brooks*, 852 F.2d at 1063-64; and *Stanfield v. Answering Service*, 867 F.2d 1290, 1294 (11th Cir. 1989) (each allowing a plaintiff to prevail simply by establishing a *prima facie* case and offering evidence attacking the credibility of the employer's explanation).

In this regard, this Court should note that the First, Fifth, and Sixth Circuits cannot agree even among themselves as to the proper definition of a *prima facia* case. *Compare, Bienkowski*, 851 F.2d at 1505 (rejecting First Circuit's definition) *with Simpson*, 823 F.2d at 940 (refusing to adopt *any* definition).

[13] *La Montagne*, 750 F.2d at 1410.

tion is subject to a reasonable difference of opinion. Moreover, given the substantial monetary exposure involved,[14] employers faced with employment decisions involving such circumstances necessarily will prefer individuals within the protected class over individuals under 40 rather than attempt, at substantial expense, to prove to a jury that they exercised sound business judgment in selecting the younger individual. This substantial question of law under the ADEA therefore must be resolved by this Court.

II. THE RULING OF THE COURT BELOW ON STATISTICAL EVIDENCE IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS ON THE SAME MATTER[15]

Statistical analyses of employment decisions generally will tend to prove the existence of a policy or practice of discrimination when they reveal a difference in treatment between similarly situated individuals within the protected class and outside of the protected class.[16] Because the focus of such evidence is upon the disparate treatment of *similarly situated* individuals, this Court has required that such analyses control for any "special qualifications" required for the positions studied. *Hazelwood School District v. United States*, 433 U.S. at 308 n.13. *See also, City of Richmond v. J.A. Croson Co.*, 109 S. Ct. at 725.

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[14] The jury awarded Bruno front pay until retirement despite the fact that she offered no evidence tending to prove that she suffered a permanent loss of earning capacity and despite the fact that front pay is intended only to be an equitable substitution for an order of reinstatement. As a result, the jury improperly guaranteed her an income which she would not have been guaranteed if she was awarded the Clinics job. *Cf., Ford Motor Co. v. EEOC.*

[15] Petitioners repeat that the court below did not rely upon the statistical evidence of record to support the jury's verdict.

[16] Because age is not an immutable characteristic, this principle should not automatically be accepted in ADEA litigation. *See, Kier v. Commercial Union Insurance Cos.*, 808 F.2d 1254 (7th Cir. 1987), *cert. denied*, 107 S. Ct. 1955 (1987); *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986).

In *Mayor of Philadelphia v. Educational Equality League*, this Court reversed a decision of the Third Circuit involving alleged racial discrimination in the selection of a nominating panel for school board members on the ground that the court of appeals should not have accepted as probative statistical analyses of that selection process which incorrectly assumed that "all citizens are fungible" for purposes of determining the pool of candidates for the positions at issue. 415 U.S. at 620-621. Because of that flaw, this Court described the statistical studies in *Mayor of Philadelphia* as "meaningless." 415 U.S. at 621.

Most recently, in *Wards Cove Packing Co., Inc. v. Atonio*, this Court reaffirmed this evidentiary requirement, holding that the statistics in that case, which failed to control for such qualifications, were "nonsensical." 109 S.Ct. at 2121-22. Significantly, the analyses of promotions and transfers in *Wards Cove* were nearly identical to Bruno's promotion and transfer analyses. In both cases, the analyses erroneously assumed that all of the defendant's employees were eligible for transfer or promotion into any open position. Thus, for example, Bruno's studies assumed that Saunders' unionized printing plant employees were eligible for any open nonprinting plant position at Saunders, no matter what skills were required for the position. That erroneous assumption in fact produced the disparities reported by Bruno, for as Saunders' expert reported in Saunders' motion *in limine*, the printing plant employees were disproportionately over 40 years of age.

Until the decision of the court below in this case, the federal courts of appeals which have dealt with the question uniformly have construed *Hazelwood* to require that a plaintiff's statistical evidence of employment discrimination must account for the minimum objective qualifications for the positions studied.[17] As the District of Columbia Circuit noted

[17] *Segar v. Smith*, 738 F.2d 1249, 1274 (D.C. Cir. 1984); *Lamphere v. Brown University*, 685 F.2d 743, 749-750 (1st Cir. 1982); *Ste. Marie v. Eastern Railroad Ass'n.*, 650 F.2d 395, 401 (2d Cir. 1981); *Lindsey v. Southwestern Bell Telephone Co.*, 546 F.2d 1123, 1124 (5th Cir. 1977); *Simpson v. Midland-Ross Corp.*, 823 F.2d at 943-944; *Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1321 (7th Cir. 1989); *Moore v. McGraw Edison Co.*, 804 F.2d at 1031; *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1436 (9th Cir. 1984), *modified* 742 F.2d 520; *Eastland v. Tennessee Valley Authority*, 704 F.2d 613, 624-625 (11th Cir. 1983).

in *Segar v. Smith*, "[t]he minimum objective qualification approach is not a quick litmus test, but an analytic method to ensure that a plaintiff's statistics measure disparities among comparably qualified workers, rather than disparities in qualification." 738 F.2d at 1274.

In this case, the court below rejected that universally accepted rule. By a 2-1 vote, it holds that in individual disparate treatment cases, statistical analyses which "[do] not account for the minimum objective qualifications of the positions into which transfer or promotion was possible . . . are 'relevant.' " 882 F.2d at 767. The majority opinion justifies the departure from this universally accepted rule of evidence by suggesting that a more lenient standard of admissibility applies in an individual disparate treatment case than that which applies in a class action case.[18] The majority opinion does not explain *how* such studies reasonably will tend to prove the existence of a policy or practice of discrimination in an individual disparate treatment case when they have been described by this Court as "meaningless" and "nonsensical" in the context of class action litigation. *See*, 882 F. 2d at 775 (Greenberg, J. dissenting).

The dissenting opinion describes the impact of the majority's decision on this case and on all future individual disparate treatment cases under Title VII or the ADEA in the Third Circuit by noting: "Liability in this case was sharply disputed, and the outcome clearly could have been a verdict for the defendants. The door is now open in this Circuit to the admission of *plainly irrelevant* statistical evidence in individual disparate treatment cases." 882 F.2d. at 775-776. (emphasis added)

As this Court has recognized, statistical evidence plays a significant role in employment discrimination litigation. *Teamsters v. United States*, 431 U.S. 324, 339 (1977). At the same time, this Court has recognized that statistics which fail to control for special qualifications required for the positions

[18] *Simpson*, *Smith*, and *Ste. Marie* (*supra* at n.17) were individual disparate treatment cases.

studied "[are] too fragmentary and speculative to support a serious charge [of discrimination] in a judicial proceeding." *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. at 621. The prejudicial effect of allowing an avowed expert to reach a conclusion essentially on the ultimate issue of fact in such cases on the basis of patently irrelevant studies may be presumed. It was expressly recognized by the dissent in this case. At the very least, the standard of admissibility for statistics in employment discrimination litigation must be the same whether such studies are offered to prove a policy or practice of discrimination in an individual disparate treatment case or in a class action case.[19]

III. THE RULING OF THE COURT BELOW ON A PLAINTIFF'S DUTY TO MITIGATE DAMAGES CONFLICTS WITH THIS COURT'S DECISION IN *FORD MOTOR CO. v. EEOC*

In *Ford Motor Co. v. EEOC*, this Court declared that the preferred means of bringing employment discrimination to an end is through "[c]ooperation and voluntary compliance." 458 U.S. at 228. To accomplish this objective, this Court instructed: "the legal rules fashioned to implement [federal laws prohibiting employment discrimination] should be designed ... to encourage ... defendants promptly to make curative, unconditional job offers to ... claimants, thereby bringing defendants into 'voluntary compliance' and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace." *Id.* In order to effectuate

[19] This Court has warned that statistics which demonstrate an employer's policy or practice of discrimination may not prove an individual disparate treatment claim of discrimination because the discriminatory policy or practice may not have been followed in that particular case. *McDonnell Douglas*, 411 U.S. at 805 n.19. For that reason, prejudicial error may result from the admission of expert testimony relating to statistics which tend to demonstrate the existence of a discriminatory policy or practice if no evidence is offered to tie the challenged decision to that policy. *Cf., Smithers v. Bailar*, 629 F.2d 892, 899 (3d Cir. 1980) (holding that statistics demonstrating pattern of discrimination were "not relevant" because plaintiff did not tie the challenged decision to that pattern). This added dimension of relevancy dictates in favor of a tighter standard of admissibility in individual disparate treatment cases.

that policy, this Court held that a victim of employment discrimination "forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied . . . ." 458 U.S. at 231-32.

In this case, a written, unconditional offer of a superior or substantially equivalent job was made to Bruno. The majority opinion of the court below acknowledges this fact. 882 F.2d at 770. That offer was made by William Wright, an executive of CBS, and it expressly repudiated any notion that her acceptance of the job was conditioned upon the dismissal of her claim. *Id.* The dissent properly notes that Wright's offer is without ambiguity on this point. 882 F.2d at 778 (noting: "surely in light of that memorandum . . . it cannot seriously be contended that if Bruno had taken the Bellmawr position, the defendants, on the basis of an alleged compromise, could have successfully moved for dismissal of her ADEA claim.").

The majority opinion below does not hold that Wright's offer reasonably could be construed as conditional or that the circumstances surrounding *that offer* could support a finding that it was not made in good faith. Rather, it holds that the earlier conditional offer of the same job, which offer Bruno attributed to a subordinate of Wright's, is sufficient in and of itself to "present[] a question of credibility" and thus sustain the jury's finding that Bruno's rejection of Wright's offer was reasonable. Since Bruno conceded that she received Wright's offer and understood that it was unconditional, and since she did not offer evidence relating to the circumstances surrounding Wright's written offer which would place the good faith of that offer in question, the implicit holding of the court below must be that the earlier conditional offer itself places the good faith of Wright's written *curative* offer in question.

The holding of the court below frustrates the ultimate goal of federal employment discrimination laws as described in *Ford Motor Co.* and directly conflicts with this Court's mandate in that case that a victim of discrimination minimize

her damages by accepting an unconditional offer of a substantially equivalent job.

If, as *Ford Motor Co.* holds, an employer can toll back pay liability by unconditionally offering a substantially equivalent job, that employer must, as a matter of law, be permitted to repudiate in writing any condition which a claimant alleges was attached to an earlier offer. Such a rule of law would, as the dissent below notes, promote corrective action by an employer, 882 F.2d at 778, and would accomplish the ultimate goal of the ADEA—providing victims of age discrimination with jobs—by forcing claimants to minimize their economic harm by accepting such employment.

If the aim of the substantive law is to promote the result described above, the law must be fashioned to prohibit a claimant's rejection of a curative offer solely because the earlier conditional offer caused the claimant to fear retaliation by the employer. The claimant must be required to accept the job, continue to pursue her claim, and, if retaliation occurs, file a second claim respecting that retaliation. Such a rule would minimize the economic harm suffered by the claimant while preserving all of her rights under the law. More importantly, if her fear is proven wrong, she will have avoided the substantial loss of wages which otherwise would occur if she rejected the job, thereby promoting the policy announced in *Ford Motor Co.*

The rule of law established by the court below will frustrate the policy announced in *Ford Motor Co.* on a broader scale by promoting the rejection of an unconditional offer of a substantially equivalent job whenever a claimant fears retaliation by the employer. It also will deny an employer its right under *Ford Motor Co.* to limit with certainty its back pay liability with respect to a claimant who fears retaliation, *unless that claimant actually accepts the job.* Again, the rule of law must be that the claimant accept the job, continue to pursue her claim, and, if retaliation occurs, file a second claim respecting that retaliation.

In sum, the rule of law established by the court below will promote a result which this Court in *Ford Motor Co.* expressly sought to prevent when it declared that a victim of employment discrimination must accept an unconditional offer of a substantially equivalent job.

CONCLUSION

This case presents questions of vital importance to the administration of the ADEA and, with respect to Questions II and III, to the administration of all federal laws prohibiting employment discrimination. Moreover, as this petition demonstrates, there exist among the circuits square and irreconcilable conflicts with respect to Questions I and II. Therefore, this Court should grant this petition and review the questions presented.

Respectfully submitted,

JOHN J. McALEESE, JR.
JOHN H. WIDMAN
McALEESE, McGOLDRICK
& SUSANIN, P.C.
Suite 240
455 South Gulph Road
King of Prussia, PA 19506
Attorneys for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No.

W.B. SAUNDERS COMPANY and CBS EDUCATIONAL AND PROFESSIONAL PUBLISHING, a Division of CBS Inc.,

Petitioners,

v.

ADELINE M. BRUNO,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Filed: August 14, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-1895

Adeline M. Bruno

v.

W.B. Saunders Company and CBS
Educational and Professional Publishing,
a division of CBS, Inc.,

Appellants

Appeal from the United States District
Court for the Eastern District
of Pennsylvania

D.C. Civil No. 86-2282

Argued April 17, 1989

BEFORE: SEITZ,* SLOVITER and
GREENBERG, *Circuit Judges*.

Filed: August 14, 1989

John J. McAleese, Jr., Esq. (Argued)
John H. Widman, Esq.
McAleese, McGoldrick & Susanin, P.C.

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* Since the date of the argument in this case, Judge Seitz has taken senior status.

Executive Terrace - Suite 240
455 South Gulph Road
King of Prussia, Penn. 19406
Attorneys for Appellants

Geoffrey P. Gompers, Esq. (Argued)
215 South Broad Street
Suite 900
Philadelphia, Penn. 19107
Attorney for Appellee

OPINION OF THE COURT

SEITZ, *Circuit Judge*.

The appeal in this Age Discrimination in Employment (ADEA) action, 29 U.S.C. § 621, *et seq.*, follows a jury verdict against the defendants W.B. Saunders Company (Saunders) and CBS Educational and Professional Publishing (CEPP) in the amount of $850,000. After the verdict, the district court, which had jurisdiction under 28 U.S.C. § 1331, denied the defendants' motion for judgment n.o.v. or in the alternative for a new trial. This court has appellate jurisdiction under 28 U.S.C. § 1291.

I.

In relating the background of this case, we rely on uncontradicted testimony, except where noted. Adeline Bruno, the plaintiff in this case, was employed by W.B. Saunders Company from 1974 until May 1986. Saunders is a publisher of medical textbooks and medical periodicals, or "clinics." During the entire time relevant to this case, W.B. Saunders was a wholly owned subsidiary of CEPP.

Prior to the events out of which this litigation arose, Bruno was Director of Saunders' Central Order

Processing Department. This position was described in Saunders' internal nomenclature as a "level 9" position. As Director of Central Order Processing, Bruno earned $44,350 annually as of December 1984.

In early 1984, Saunders announced plans to eliminate the Central Order Processing Department. One consequence of this would ultimately be the elimination of Bruno's job. Bruno was at the time forty-six years old.

Later that year, while Bruno was still working in her Central Order Processing job, the Manager of the Clinics Fulfillment Department at Saunders was transferred, and his job became open. Anthony Degutis, then Director of Budgets and Planning at Saunders, was given responsibility for finding a replacement. Within the Saunders hierarchy, the title "Manager" was a step below that of "Director," the title then held by Bruno. The newly open position was classified by Saunders as a "level 8" position. Bruno applied for the job.

The Clinics Fulfillment Department processes ("fulfills") orders for Saunders' clinics. From 1977 until it was computerized in 1980, the Clinics Fulfillment Department had been under the direction of Bruno in her capacity as Director of Central Order Processing. Degutis testified that his original belief was that Bruno "would best fill this position." Indeed, Degutis was informed by two CEPP executives in New York to whom Bruno had indirectly reported, Richard Bates and William Wright, that Bruno was the obvious successor to the Clinics Fulfillment position.

At the interviews conducted by Degutis, Beverly Dietrich, one of the ten candidates for the position, was treated differently from the others. Dietrich, who was then 36, was taken out by Degutis for a ninety minute lunch at an upscale restaurant near Saunders' office in Philadelphia. None of the other candidates

was taken to a restaurant. Bruno was interviewed for approximately twenty minutes in a vacant office in the Saunders building.

Degutis testified that Dietrich "was not at the time we started the interview process[,] in my mind[,] qualified" for the Clinics Fulfillment position. At the time of the interviews for the job of Manager of Clinics Fulfillment, Dietrich was a Supervisor of Systems Analysis in the Clinics Fulfillment Department. Within the Saunders hierarchy, "Supervisors" are below "Managers." Dietrich's particular job was classified as a "level 3" position. Dietrich had been with Saunders three years, and had worked on the computerization of the Clinics Fulfillment Department. At the time of her interview, Dietrich was earning an annual salary of $19,773

Dietrich's previous work experience -- beginning several years before she began working at Saunders -- had been as Assistant Manager and then Manager of the Arena Stage, a theater in Washington, D.C. In that position she was responsible for a staff of 15 to 20 people. She was paid on an hourly basis. Her more recent work experience prior to joining Saunders had been as a sales clerk at Bamberger's Department Store and as a front office manager at a grocery store.

Two months before formally filling the position, Degutis made Dietrich temporary head of the Clinics Fulfillment Department. While Dietrich was at the time the senior of the three Supervisors in the Department, Bruno testified that Degutis told her that Dietrich had been given this job because "I know how everybody felt about Beverly so I wanted to give her a chance to prove herself." Degutis testified that this interim appointment was not intended to be a testing period for Dietrich.

Ultimately, Degutis chose Dietrich to fill the post permanently. Although the job had been posted as a

"level 8" position, it was given initially to Dietrich as a "level 7." Dietrich was raised from a level 3 to a level 8 in two steps primarily because Saunders management felt that her salary increase would otherwise have been too great for one person to receive at one time. Six months after her installment as Manager of Clinics Fulfillment, Dietrich's annual salary was $29,000. Following Dietrich's selection, Bruno filed an Equal Employment Opportunity Commission (EEOC) charge alleging discrimination on the basis of age.

Several months after she was passed over for the Clinics Fulfillment position, and while she was still working at Saunders, Bruno was offered a job as Manager of Inventory Planning and Control in the Bellmawr, New Jersey warehouse facility Saunders shared with other CEPP subsidiaries. Bruno first accepted the job, but changed her mind four weeks later, before the job commenced. Bruno testified that she was told by a CEPP executive that a condition of her employment in that position was that she not proceed with her age discrimination claim.

Bruno was laid off by Saunders in May 1986. After her termination, Bruno continued to receive pay for four months. Seven months after her severance pay ended, Bruno accepted a job at the Provident National Bank for an annual salary of $18,000 plus benefits.

Bruno brought this action in the district court under the ADEA.[1] After trial, the jury found the defendants liable for "willful" age discrimination in their failure to give Bruno the Manager of Clinics Fulfillment job, and awarded liquidated damages as provided for by the statute. *See* 29 U.S.C. § 626(b). The jury verdict in favor of Bruno included $150,000

1. Bruno's complaint also included allegations of sex discrimination in violation of title VII, 42 U.S.C. § 2000e, *et seq.*, discrimination in violation of state law, and breach of contract. Bruno no longer presses these claims.

denominated "lost wages and benefits" and $700,000 denominated "front pay." The parties agree that half of each of these amounts represents liquidated damages.

On appeal, the defendants present a litany of alleged errors.

II.

The defendants' first challenge to the judgment in the district court is that the evidence was insufficient to support the verdict. To win on such a challenge, the defendants must show that the record "is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." *Simone v. Golden Nugget Hotel*, 844 F.2d 1031, 1033 (3d Cir. 1988) (citation omitted).

Under the now familiar analytical framework that has been established for analyzing ADEA claims, the plaintiff first bears the burden of establishing a *prima facie* case. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). If the plaintiff meets this burden, it raises an inference of unlawful discrimination. The burden of production then shifts to the defendant, who can dispel the inference of discrimination by articulating a "legitimate, non-discriminatory reason" for its employment action. *McDonnell-Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 255. If the defendant succeeds in this, the burden then returns to the plaintiff, who retains the ultimate burden of persuasion. *Burdine*, 450 U.S. at 256. To win his case, the plaintiff must "prove by a preponderance of the evidence that the proffered reasons were not the employer's true reasons." *Sorba v. Pennsylvania Drilling Company*, 821 F.2d 200, 202 (3d Cir. 1987), *cert. denied*, 108 S.Ct. 730 (1988).

Saunders and CEPP argue that the evidence was insufficient to support the verdict because it was not adequate to raise an inference of age discrimination at the *prima facie* case stage. They also argue that the evidence is insufficient to support a jury finding that their articulated, non-discriminatory reason for the employment decision in this case is mere pretext.

A.

The defendants first challenge the sufficiency of the evidence to raise an inference of age discrimination at the *prima facie* case stage. Of course, after a case has been tried to a jury on the merits, "it is unnecessary for the appellate court to decide whether a *prima facie* case had, in fact, been established." *Blum v. Witco*, 829 F.2d 367, 372 n.2 (3d Cir. 1987). "Where the defendant has done everything that would be required of him if the plaintiff had made out a prima facie case, whether the plaintiff really did so is no longer relevant." *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). Rather, the appellate court must consider the ultimate issue: whether the plaintiff proved by a preponderance of the evidence that age was a determinative factor in the employer's hiring decision. *Blum*, 829 F.2d at 372 n.2. "The issue of whether plaintiff established a *prima facie* case is subsumed on appeal into whether the plaintiff has sustained his or her ultimate burden," *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 654 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987).

We will therefore treat the defendants' first contention as an argument that the evidence is insufficient to support the verdict. The defendants' contention in essence is that the evidence of a ten-year difference in age between Bruno, who was 46 at the time she applied for the Clinics Fulfillment job,

and Dietrich, who was then 36, is insufficient to support an inference of age discrimination essential to plaintiff's case. Put another way, the defendants argue that the evidence could not support an ultimate conclusion that their employment action was discriminatory because it is insufficient to allow any inference that Bruno's age was a determining factor.[2]

We disagree. Congress has defined the protected class to include only those people between forty and seventy years of age. 29 U.S.C. § 631 (a). Where the plaintiff is a member of the protected class and the successful candidate is not, the precise difference in age between the plaintiff and the successful candidate is not decisive, at least in a case such as this where the difference is not so small as to make an inference of discrimination absurd.

Contrary to the defendants' suggestion, this conclusion is not inconsistent with *Maxfield v. Sinclair International*, 766 F.2d 788 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986). In *Maxfield* we held that the difference in age between a 65-year old and a 42-year old was "sufficient" to make out one of the elements of a *prima facie* case necessary to raise an inference of age discrimination at that stage of the litigation. *Maxfield*, however, presented a situation where the plaintiff and the successful job applicant were both *within* the protected class. In that context we found it necessary to examine the magnitude of the age difference in order to determine whether it would support an inference of discrimination.

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2. Although we do not address this contention in terms of the *prima facie* case, it may be that our inquiry into the sufficiency of the evidence to support such an inference will not differ markedly from an inquiry into whether the plaintiff has introduced evidence sufficient to establish one of the elements essential to her *prima facie* case. *Cf., Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1115 n.10 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 3213 (1989).

This case presents the more common type of discrimination case where the plaintiff is within the protected class and the person ultimately chosen for the job is not. In title VII cases of race or sex discrimination, from which our method of analyzing age discrimination claims has been transplanted, this would be enough to support an inference of discrimination. *See, e.g., Jackson v. University of Pittsburgh*, 826 F.2d 230, 233 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 732 (1988) (title VII race discrimination case) (where plaintiff is within protected class, one element of *prima facie* case made out simply by showing that persons treated more favorably were not within the protected class). So it is in actions under the ADEA. *Maxfield* did not disturb the settled rule that more favorable treatment for those not within the protected class will support an inference of age discrimination. *See, e.g., Massarsky v. General Motors*, 706 F.2d 111, 118 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983) (to make out *prima facie* case, plaintiff "need only show that he is a member of the protected class and that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably"). We conclude therefore that the evidence here was sufficient to support an inference of age discrimination.

B.

"[O]nce the defendant has produced admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus ... plaintiff's ultimate burden of persuasion includes the requirement to show that the defendant's proffered reason is a pretext for discrimination." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 898 (3d Cir.) (in

banc), *cert. dismissed*, 108 S. Ct. 26 (1987). In their second, more narrow, challenge to the sufficiency of the evidence to support the verdict, the defendants argue that even if the evidence of the difference in age between Bruno and Dietrich was sufficient to support an inference of discrimination, there was insufficient evidence to support a conclusion that the defendants' proffered reason was a pretext.

The defendants here did articulate a legitimate, non-discriminatory motive for failing to hire Bruno for the Clinics Fulfillment job. The defendants state that Bruno was not selected because it was Degutis's perception that her interest in the job was half-hearted. They also contend that Dietrich was selected over Bruno based on her performance as acting head of the Clinics Fulfillment Department during the two months that preceded her actual hire to fill the Manager of Clinics Fulfillment position. Before the district court, Degutis testified additionally that among the reasons he selected Dietrich were her "enthusiasm" and the fact that she was the "most qualified" candidate. The defendants do not rely on these explanations in this appeal.

There is a variety of evidence that tends to rebut the defendants' articulated reasons for their employment action. As to Bruno's interest in the job, Bruno testified that she spoke to Degutis often about the job during the time between her interview and the time the position was ultimately filled, and that, indeed, at one point he said to her "Addie, quit pushing." Both Degutis himself and Richard Bates, then CEPP's Vice-President for Fulfillment Services, testified that, subsequent to Bruno's interview with Degutis, Bates told Degutis that Bruno wanted the job. Degutis also testified that Bruno mentioned the job to him -- albeit offhandedly -- more than once

during the period when he was selecting among the candidates for the position.

As to Dietrich's performance during the interim period when she was acting head of Clinics Fulfillment, there was testimony in the district court by others employed by Saunders during that time -- the Director of Management Information Systems, and the Manager of Computer Operations -- that Dietrich did not show ability, at least in some aspects of the job. The evidence in its totality meets the minimum threshold necessary to support a conclusion that the defendants' proffered reasons were a pretext.

The law is clear that a plaintiff can win an age discrimination action without *direct* evidence specifically relating to age by proving that the reason for the unfavorable treatment put forward by the employer is a pretext. *Chipollini*, 814 F.2d at 898. The message of *Chipollini* is *not*, however, that anyone who suffers an adverse employment decision can win a discrimination suit. The message is that Justice Rehnquist's words for the Supreme Court will be taken seriously: "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's action, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). This framework places a premium on truthfulness by the defendant. If a "legitimate, non-discriminatory" reason articulated by a defendant faced with a *prima facie* case of discrimination is not the *true reason* for a failure to hire, the court may infer that the actual reason was impermissible.

III.

The defendants next argue that the district court erred in the admission of evidence and they ask for a new trial. In this Circuit, review of rulings on relevance is plenary. *See Brobst v. Columbus Services*, 824 F.2d 271, 274 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 777 (1988). Other evidentiary questions are reviewed for abuse of discretion.

A.

The defendants challenge the statistical evidence Bruno presented. In particular, they attack studies done by plaintiff's expert that compare whether Saunders employees ove forty years of age received transfers or promotions in proportion to the percentage of all Saunders employees over forty. The defendants argue that these studies are irrelevant because they did not account for the minimum objective qualifications of the jobs into which transfer or promotion was possible. The Supreme Court has held that "[n]ormally, failure to include variables will affect the analysis' probativeness, not its admissibility." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (Brennan, J., joined by all other Members of the Court, concurring in part). It has also noted that "[t]here may, of course, be some regressions so incomplete as to be inadmissible as irrelevant." *Id.* at 400 n.10.

Unlike the main cases cited by the defendants, this is not a class action disparate impact or disparate treatment case. *See Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985) (disparate impact); *Valentino v. United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982) (disparate treatment). In such cases, statistical evidence that does not account for minimum objective

qualifications may not "measure disparities among comparably qualified workers, rather than disparities in qualifications." *Segar*, 738 F.2d at 1274. Of course, even in such cases, the requirement that statistical evidence account for minimum qualifications is not a "hard and fast rule." *Id.* Still, as a general matter, in class actions -- "where liability depends on a challenge to systemic employment practices[,] courts have required finely tuned statistical evidence." *Krodel v. Young*, 748 F.2d 701, 709 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985).

By contrast, in individual disparate treatment cases such as this, statistical evidence, which "may be helpful, though ordinarily not dispositive," *id.* at 710, need not be so finely tuned. In individual disparate treatment cases such as this, a general rule requiring that all statistical evidence account for minimum objective qualifications would not be broadly useful. Rather, "the usefulness of statistics will depend primarily upon their relevance to the specific decision affecting the individual plaintiff." B. Schlei and P. Grossman, *Employment Discrimination Law* 1316 (2d ed. 1983). *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977) (the usefulness of statistics "depends on all the surrounding facts and circumstances").

The statistical evidence in this case is being used to bolster the plaintiff's case that the defendants' articulated reason for an individual employment decision is a pretext. Even though it does not account for the minimum objective qualifications of the positions into which transfer or promotion was possible, we oonclude that the studies are "relevant." That is, as evidence they meet the requirement of Federal Rule of Evidence 401 that they "make the existence of any fact that is of consequence to the determination of the action more probable or less

probable than it would be without the evidence." Fed. R. Evid. 401. *Compare McDonnell-Douglas*, 411 U.S. at 804 - 05 (defendant's policy and practice with respect to employment of protected class relevant to showing of pretext).[3]

The studies are significantly less probative than they would be if they took account of the minimum qualifications of the jobs into which promotion or transfer occurred. However, the district court's conclusion that they are more probative than prejudicial was within the limits of the permissible exercise of that court's sound discretion.

B.

The defendants also challenge the plaintiff's statistical studies because they compare new hires to the age of existing employees -- without taking account of the correlation between age and normal corporate advancement -- and because along with "individual termination decisions" they consider terminations resulting from Saunders' decision to close its printing plant. The plaintiff contends that these objections were waived because they were not specifically made in the district court. While the defendants did not object to this evidence at the time of introduction, they did challenge it in their motion *in limine*.

While normally an objection to the admission of evidence must be raised at trial to be preserved, this court will sometimes permit evidentiary question to be

3. This conclusion also disposes of the defendants' contention that there is no admissible evidence to support the district court's instruction to the jury that Bruno could establish age discrimination "by showing that defendants engaged in a pattern or practice of discrimination against their employees or prospective employees." The defendants do not argue that this jury instruction contains a misstatement of the applicable law.

preserved by a motion *in limine*. *See American Home Assurance Co. v. Sunshine Supermarket*, 753 F.2d 321 (3d Cir. 1985). A determination that the objections were preserved by a motion *in limine* requires an evaluation of the extent of the briefing on the motion *in limine*, and the definitiveness of the district court's ruling on the motion. The pretrial motion will suffice only if we conclude that requiring an objection at trial "would have been in the nature of a formal exception." *Id.* at 324 - 25.

In this case, the defendants' brief in support of its motion *in limine* specifically raised the evidentiary issues the defendants now wish to present before this court. However, the defendants have not pointed to any place in the record where their motion was ruled on by the district court. Without a definitive ruling against the defendants, there could be no reliance factor in this case. Consequently, the defendants, in failing to object to these studies at trial, have failed to preserve this issue for appellate review.

C.

The defendants also challenge the admission of evidence that Degutis and Dietrich, the woman he finally chose for the Clinics Fulfillment position, were seen together frequently. They argue that no reasonable inference of age discrimination can be drawn from this evidence. After an examination of the record, we conclude that, even if this evidence was not admissible, there was no reversible error.[4]

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4. Neither was there any reversible error in the district court's decision to exclude evidence of Dietrich's post-selection performance on the ground that it is irrelevant to Dietrich's qualifications to be selected for the Clinics Fulfillment position.

IV.

A.

The defendants also seek a new trial on the basis of alleged error in the district court's instruction to the jury that "[w]here economic savings are directly related to an employee's age, however, it is a violation of the [ADEA] not to hire an older employee for those reasons .... [I]f you believe that the economic savings to the company were an age related factor which induced the defendants to hire Beverly Dietrich for economic reasons rather than an older employee such as Adeline Bruno, then Adeline Bruno is still entitled to prevail on her claim."

In the district court, at the end of the jury charge, the defendants challenged this instruction only on the ground that there was insufficient evidence to support it. The defendants renew this contention before this court.[5]

We find the defendants' challenge without merit. While there may not be any evidence that there was a correlation between age and salary across the board at Saunders, there certainly was evidence that there was a financial saving involved in hiring the younger Dietrich over the older Bruno. In addition, there was testimony of another employee who was not chosen for the Clinics Fulfillment job, Ann Marie Martino, that CBS (of which CEPP is a division) was trying to reduce its number of longer-term employees in order to reduce its costs. Because the defendants' contention is without merit, the district court's refusal to grant a new trial on this ground was not an abuse of discretion.

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5. A second objection that the defendants urge before this court -- that the instructions did not accurately state the substantive law -- was not presented in the district court.

B.

We also find without merit the defendants' contention that a new trial is required because the district judge instructed the jury on the circumstantial order of proof developed in the *McDonnell-Douglas* line of cases. Even assuming that submission to the jury of the question whether the plaintiff made out a *prima facie* case is error, we do not believe the instructions here could have confused and misled the jury such that the defendants would be prejudiced. At worst, the jury instructions -- which, taken as a whole, fairly and adequately described the shifting burdens of production and persuasion -- presented the plaintiff with an additional obstacle, the possibility that the jury would find for the defendants on the basis that the plaintiff failed to make out a *prima facie* case. Therefore there again was no abuse of discretion when the district court declined to grant a new trial on this ground.

C.

The defendants' most confusing allegation involves a so-called missing witness, CEPP executive William Wright. Bruno testified at trial that Wright told her "off the record" that if he had been her, he would have pursued an age discrimination claim. She testified that he also told her "if you ever repeat that, I'll deny it." While defendants' counsel said in his opening statement that he would call Wright to testify, Wright was not called. Although there was no evidence concerning Wright's availability, the district judge gave the jury a standard "missing witness" instruction charging them to decide whether Wright was reasonably available only to the defendant or equally available to both parties in ascertaining whether to draw an adverse inference from the defendants' failure to call him.

While the jury deliberated, the judge -- at the suggestion of defendants' counsel -- took the highly unusual step of taking Wright's testimony by telephone from New York. The purpose of this call was apparently to get testimony concerning Wright's availability. Wright testified that Bruno saw him and spoke to him during one morning of the trial when he was in the courtroom. Wright also testified -- in response to a question from the judge -- that he had not made the statement attributed to him by Bruno. The judge granted the defendants' motion to admit this testimony. However, by this time, the jury had reached a verdict for Bruno.

Nonetheless, the district judge permitted the jury to hear the testimony of Bruno and her counsel that neither one of them had knowledge that Wright was in the courtroom during the trial. The judge then had a tape recording of Wright's telephone testimony played to the jury. The judge permitted an additional summation by each side, then sent the jury back to deliberate further with an interrogatory asking whether this evidence would cause them to change their verdict. Eight minutes later, the jury returned with the answer "No."

The defendants challenge the propriety of giving a missing witness instruction, and argue that the instruction given by the district judge was in error. The plaintiff contends that there was evidence sufficient to permit a conclusion that Wright was peculiarly within the defendants' power to produce. She also argues that any error was cured by the post-verdict proceedings in the district court which presented evidence to the jury on the question of Wright's availability to the parties.

The parties miss the significance of the introduction of Wright's testimony. Wright testified not merely on his *availability*, but on the issue on

which the inference adverse to the defendant was permitted to be drawn. Thus, the judge's post-verdict interrogatory to the jury did not merely ask them to reconsider Wright's availability to the parties, it asked them to reconsider their verdict in light of Wright's testimony *favorable to the defendants* that he had not told Bruno that she was right to pursue her age discrimination charge. Thus, the "missing witness" is no longer missing and any taint that might have been caused by the allegedly improper charge was cured by his testimony and the district judge's post-verdict interrogatory.[6]

V.

The defendants next argue that there was insufficient evidence to permit the jury to find that Bruno satisfied her duty to minimize her damages. They assert that Bruno's rejection of the job she was eventually offered as Manager, Inventory Planning and Control at the Bellmawr, New Jersey warehouse facility constituted a rejection of an unconditional offer of a "substantially equivalent" job. The defendants contend that this forfeits her right to monetary relief for any period subsequent to that rejection.

In *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232 (1982), the Supreme Court held that an employment discrimination plaintiff's duty to minimize his damages includes a requirement that he accept a "substantially equivalent" job offered by the

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6. This also disposes of the defendants' contention that the district judge erred in permitting plaintiff's counsel to make a "missing witness" argument in his closing argument to the jury. The defendants' contention that there is clear and convincing evidence that the plaintiff and her counsel procured the judgment through fraud by denying Wright was available to them is also without merit.

defendant. If the plaintiff fails to accept such a job, the accrual of back pay liability by the defendant employer will be tolled. The Supreme Court, however, also recognized in *Ford Motor Co.* that the plaintiff's obligation in this regard was not absolute. "The claimant's obligation to minimize damages in order to retain his right to compensation does not require him to settle his claim against the employer, in whole or in part. Thus an applicant or discharged employee is not required to accept a job offered by the employer on the condition that his claims against the employer be compromised." *Ford Motor Co.*, 458 U.S. at 232 n.18.

The jury here found by special interrogatory that the job Bruno was eventually offered as Manager, Inventory Planning and Control at the Bellmawr, New Jersey warehouse facility was "superior or substantially equivalent" to the Clinics Fulfillment position that Bruno was denied. A second interrogatory asked whether "the plaintiff act[ed] as a reasonable person under the circumstances would have acted when she rejected the offer of the Bellmawr job." We understand this interrogatory to address the question whether the offer of the Bellmawr job was conditioned on Bruno dropping her age discrimination claim.[7] The jury answered in the affirmative.[8] The defendants now argue that the evidence was insufficient to support the jury's conclusion.

Even assuming this contention was not waived, an examination of the record reveals that the defendants' position is without merit. Bruno testified

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7. The defendants did not challenge this interrogatory in the district court on the basis that it contained a misstatement of the applicable law.

8. Under our understanding, the jury's answers to these two interrogatories are not, as defendants suggest, "inconsistent."

that Richard Bates, then Vice-President of Fulfillment Services at CEPP in New York, told her "that it would be expected of me to drop my [EEOC] claim if I accepted [the Bellmawr job] ... and I took that to mean that -- that you better do it or they're gonna find a way to get rid of you." She also testified that this conversation made her feel that "They're gonna get you over in a job that you can't do and they're gonna find an excuse to get rid of you."

Bruno testified that she felt her fear was supported by her discussion with Bates: "I even said to Rick, 'Suppose I try it. Will you put in writing that if it doesn't work out and I can still be let go and have my same severance that I would have had in February?' And he said, 'Well, I don't think we can do that.' And then I thought right then and there: Well ... they really are not offering this to me as a way to help me; they're just trying to help themselves. They want me to drop my claim."

This evidence is sufficient to permit the jury's award notwithstanding the substantial equivalence of the Bellmawr job with the Clinics Fulfillment position for which Bruno originally applied.

The defendants rely on the fact that Bates's superior, William Wright, subsequently wrote Bruno a note, at a time when she could still have taken the job, saying "[t]he Bellmawr job offer is not, and never was, conditional on dropping your claim. If it was, the condition would necessarily have been stated in writing ... I do not understand how your perception of this matter evolved."

The defendants argue that this memo renders irrational any inference that the Bellmawr job was conditioned on Bruno dropping her EEOC charge. This evidence, however, merely presents a question of credibility. Notwithstanding the memo, the record

contains sufficient evidence to support the jury's conclusion.[9]

The defendants also point out that Bruno testified in a deposition that after receiving Wright's memo, "I understood that I could accept the job and still pursue the claim if I wanted to." In context, the jury was entitled to read this simply as a statement of Bruno's belief that any such condition was contrary to law. Bruno's testimony does not alter the fact that there is sufficient evidence to support a conclusion by the jury that the Bellmawr job was conditioned on Bruno's claim being compromised.

VI.

The defendants finally challenge the district court's award of liquidated damages. The ADEA provides that "liquidated damages shall be payable only in cases of willful violations." 29 U.S.C. § 626(b). A finding of willfulness in an individual disparate treatment case requires not merely that the employer knew or should have known that its conduct violated the ADEA, but "some additional evidence of outrageous conduct." *Dreyer v. Arco Chem. Co.*, 801 F.2d at 658. "The Restatement suggests that in assessing punitive damages, the trier of fact can properly consider *inter alia* the character of the defendant's act, and the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause." *Id.* (quoting Restatement (Second) of Torts § 908(2)) (brackets and internal quotation marks omitted). "[T]he appropriateness of the award [of liquidated damages is] dependent upon an ad hoc inquiry into the particular circumstances." *Id.* The jury in the present case awarded Bruno $150,000 in

9. The defendants make no suggestion that Wright's memo gave rise to any new duty on Bruno's part.

back pay, of which the parties agree $75,000 represents liquidated damages and $700,000 in front pay of which the parties agree $350,000 represents liquidated damages.[10]

A.

To begin with, the defendants argue that the evidence is not sufficient to support a finding of willfulness. We disagree. Again assuming this objection was not waived, after examining the record we conclude that there is sufficient evidence of willfulness to support an award of liquidated damages.

As to the character of the defendants' action, both Bruno and Ann Marie Martino, another applicant who was not chosen for the Clinics Fulfillment post, testified that a job description prepared for the opening in that position was unusual in that it did not include a requirement of "management experience." A jury could infer that the job description was intended to provide a justification for the selection of Dietrich over Bruno. We also observe that the evidence surrounding the offer to Bruno of the Bellmawr job could support a conclusion that the position was offered her in bad faith.

Additionally, there is evidence that the discriminatory action here was taken against an employee who was being laid off after eleven years of service, in favor of an employee whose then-current job at Saunders was not being eliminated. It is also relevant that there is evidence that during her tenure at Saunders, Bruno received the CBS Employee Achievement Award and an "outstanding employee" award from Saunders for demonstrating

10. We conclude that, taken as a whole, the district court's instructions fairly and adequately presented to the jury the standard for finding a "willful" violation of the statute.

"commitment and excellence beyond the normal requirements of [her] position."

As to the extent of the harm caused to Bruno, there is evidence that she was unable to find another job for eleven months, and that she eventually had to accept an enormous reduction in salary. Taken together, the evidence -- though concededly not all of equal weight on the issue -- is sufficient to support the finding of "outrageousness" required to award liquidated damages.

B.

The defendants next argue that even if the evidence supports an award of liquidated damages, such damages are not permissible on front pay. Liquidated damages are defined in the Fair Labor Standards Act, 29 U.S.C. § 216(b), incorporated by reference in the ADEA, 29 U.S.C. § 626(b), as an amount equal to "minimum unpaid wages or ... unpaid overtime compensation." The defendants argue that front pay is an equitable substitution for an order of reinstatement, and not an award of lost future wages. The plaintiff argues that the deterrent purpose of liquidated damages will be served identically whether the award is for "front pay" or "back pay," and that the division of lost wages into past and future components is largely a matter of fortuity, depending upon how long it takes for the case to get to trial.

This dispute was settled in this Circuit by *Blum v. Witco*, 829 F.2d at 382 - 83. While *Blum* by its terms applies only to front pension benefits, its implication is unmistakable: "A front pay (or, in this case, front benefits) award is the monetary equivalent of the equitable remedy of reinstatement. Given its tenor, we decline to extend the liquidated damages provision of the ADEA to double this equitable

award." *Id.* at 383 (citations omitted). The district court's award will be reduced by the amount that represents liquidated damages for front pay.[11]

VII.

The judgment of the district court will be affirmed after a reduction of $350,000. Seventy-five percent of the costs will be allocated against appellants, and twenty-five percent against appellee.

GREENBERG, Circuit Judge, dissenting.

I respectfully dissent. Bruno's three statistical studies of transfers and promotions, new hires, and terminations had no probative value because they failed to take into consideration the "minimum objective qualifications" necessary for the positions at issue. The Supreme Court has concluded that statistical analyses offered into evidence in employment discrimination cases which do not take into consideration the special qualifications which

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11. The defendants' challenges to the amount of front pay awarded are without merit. Assuming without deciding that the defendants preserved their objection to the jury instructions on front pay, we conclude that the instructions taken as a whole fairly presented the issue to the jury, including the question of the duration of the period for which front pay should be awarded.

The determination of the *amount* of front pay necessarily involves some imprecision. However, to permit the jury to undertake that calculation is not reversible error and we decline to order a new trial simply because the amount is not the same as that offered by Bruno's expert.

may be necessary for the positions at issue are fundamentally flawed.

In *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736 (1977), a Title VII case in which the government alleged racial discrimination in the hiring of teachers, "the Court of Appeals rejected the trial court's analysis of the statistical data as resting on an irrelevant comparison of Negro teachers to Negro pupils," and "directed judgment for the Government." *Id.* at 304-06, 97 S.Ct. at 2740-41. While it vacated the judgment of the court of appeals,[1] the Supreme Court observed that

> the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.

Id. at 308, 97 S.Ct. at 2741-42.

Although recognizing that work-force/general population comparative statistics may be "highly probative ... [when] the job skill involved ... [-- such as] the ability to drive a truck -- is one that many persons possess or can fairly readily acquire," *id.* at 308 n.13,

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1. The Court held that

> the Court of Appeals erred in disregarding the post-Act hiring statistics in the record, and that it should have remanded the case to the District Court for further findings as to the relevant labor market area and for an ultimate determination of whether Hazelwood engaged in a pattern or practice of employment discrimination after May 24, 1972.

433 U.S. at 313, 97 S.Ct. at 2744.

97 S.Ct. at 2742 n.13 (discussing *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-340 & n.20, 97 S.Ct. 1843, 1856 & n.20 (1977)), the Court stated that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." 433 U.S. at 308 n.13, 97 S.Ct. at 2742 n.13.[2]

The Supreme Court in *Hazelwood* referred to *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S.Ct. 1323 (1974), as an example of a case "in which the racial-composition comparisons failed to take into account special qualifications for the position in question." 433 U.S. at 308 n.13, 97 S.Ct. at 2742 n.13 (citing *Educational Equality League*, 415 U.S. at 620-21, 94 S.Ct. at 1333-34). In *Educational Equality League*, the plaintiffs alleged that the mayor of Philadelphia had violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against blacks in making appointments to the city's panel charged with submitting nominees to him to fill vacancies on the city's school board. The Supreme Court reversed the finding of racial discrimination by the court of appeals because it was based, in part, on "racial-composition percentage comparisons [of the panel's racial composition to that of Philadelphia's population] that we think were correctly rejected by the District Court as meaningless." The Court stated

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2. In two recently decided Title VII cases, the Supreme Court has reaffirmed the *Hazelwood* requirement that statistical studies purporting to provide evidence bearing on employment discrimination take into account the qualifications required for the positions at issue. *See Wards Cove Packing Co. v. Atonio*, ___ U.S. ___, 109 S.Ct. 2115, 2121-22 (1989); *Watson v. Fort Worth Bank and Trust*, 487 U.S. ___, ___, 108 S.Ct. 2777, 2790 (1988).

that "this type of proof is too fragmentary and speculative to support a serious charge in a judicial proceeding." 415 U.S. at 621, 94 S.Ct. at 1333.[3]

In another Supreme Court Title VII case, *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000 (1986), the plaintiffs had attempted to introduce into evidence statistical studies based on multiple regression analyses designed to show that employee salary levels were affected by the employer's racial discrimination. The district court held that, although the regressions used four variable factors, consisting of race, education, tenure, and job title, the failure to use other factors, including pay increases which varied by county, precluded their introduction into evidence. *See id.* at 398-99, 106 S.Ct. at 3008.

The district court's decision to exclude this evidence was upheld by the court of appeals. However, the Supreme Court held that

> [t]he Court of Appeals erred in stating that petitioners' regression analyses were 'unacceptable as evidence of discrimination,' because they did not include 'all measurable variables thought to have an effect on salary level.' The court's view of the evidentiary value of the regression analyses was plainly incorrect. While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the *major factors* 'must be considered unacceptable as evidence of

3. The Court observed that "assuming, *arguendo*, that percentage comparisons are meaningful in a case involving discretionary appointments, the relevant universe for comparison purposes consists of the highest ranking officers of the categories of organizations and institutions specified in the city charter, not the population at large." 415 U.S. at 620-21, 94 S.Ct. at 1333.

> discrimination.' Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.

Id. at 400, 106 S.Ct. at 3009 (emphasis added) (citation omitted).

It is significant that the Court added in a footnote that "[t]here may, of course, be some regressions so incomplete as to be inadmissible as irrelevant; but such was clearly not the case here." *Id.* at 400 n.10, 106 S.Ct. at 3009 n.10.

In *Bazemore*, the Supreme Court addressed a statistical study which, although not including "all measurable variables," included all "major factors." *Id.* at 400, 106 S.Ct. at 3009. The statistical studies submitted by Bruno, however, were apparently not controlled for any factor other than age.[4] Furthermore, the plaintiffs in *Bazemore* had "presented evidence to rebut [defendants'] contention that county to county variations in contributions to salary explain the established disparity between black and white salaries." *Id.* at 402, 106 S.Ct. at 3010. In this case, Bruno did not produce evidence to refute the defendants' assertion that her statistical studies would show no disparities based on age if they had taken into consideration the minimum objective qualifications of the positions at issue.

Relying on *Hazelwood*, the United States Court of Appeals for the District of Columbia Circuit, in a Title VII case, noted that

> [t]he most common nondiscriminatory explanation for a systemic disparity in treatment is a lack of qualifications among the minority

4. Bruno does not contend, nor could she in the face of her expert witness's trial testimony to the contrary, that the statistical studies were controlled for specific job qualifications. *See* app. at 603-623.

> group members. A plaintiff's statistical evidence must therefore focus on eliminating this nondiscriminatory explanation by showing disparities in treatment between individuals with comparable qualifications for the positions at issue.
>
> . . .[B]oth the methodology and the explanatory power of the statistical analysis must be sufficient to permit an inference of discrimination.
>
> . . . To ensure that a plaintiff's methodology has eliminated the common nondiscriminatory explanation of a lack of qualifications, this circuit has developed a requirement that statistical evidence of disparities account for the *minimum objective qualifications* for the positions at issue.

Segar v. Smith, 738 F.2d 1249, 1274 (D.C. Cir. 1984)(citing *Hazelwood*, 433 U.S. at 308 n.13, 97 S.Ct. at 2742 n.13)(citation omitted),[5] *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357 (1985); *see Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 943-44 (6th Cir. 1987) (ADEA); *Palmer v. Shultz*, 815 F.2d 84, 91 & n.6 (D.C.Cir. 1987) (Title VII); *Valentino v. United*

5. In *Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465 (D.C. Cir. 1987), a Title VII case where the employer's promotion practices were at issue, the court observed that, although in the usual case "no inference of unlawful racial animus can be drawn from a statistical comparison that fails to account for relevant job qualifications," taking into account such qualifications was unnecessary where the employer had established "no objective critera governing promotions." *Id.* at 469, 470; *see Davis v. Califano*, 613 F.2d 957, 964-65 (D.C. Cir. 1979). However, here there is ample evidence, including Bruno's testimony and documentary evidence concerning defendants' personnel policy, including job posting, *see, e.g.*, app. at 880, 895, 897, 900-900h, showing that at least some of the positions which were the subject of the statistical studies required particular qualifications.

States Postal Serv., 674 F.2d 56, 69 (D.C. Cir. 1982) (same); *Grano v. Department of Dev.*, 637 F.2d 1073, 1078-79 (6th Cir. 1980) (same).[6]

In its charge to the jury in this case, the district court, after discussing expert witnesses in general, referred to statistical evidence and stated that

> in order for a statistical analyses [*sic*] of an employer's personnel decisions to reveal an apparent age bias not produced by chance or other nondiscriminatory factors in those personnel decisions, the analyses must utilize accepted methods and formulas and must account for the minimum objective qualifications for the positions filled by those personnel decisions.
>
> Statistical analyses which apparently reveal an age bias in personnel decision making but which do not control for the minimum objective qualifications necessary for the positions studied are for all intents and purposes meaningless.
>
> So you should scrutinize closely the statistics, the basis for them and recall the various apples and oranges, apples and apples arguments in looking at the statistics to see that they are of some assistance to you in reaching a proper result in this case.

App. at 379-80.

The difficulty with this charge, though a correct statement of the law, is that it required the jury to

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6. The standard for relevancy should be the same whether the statistical evidence is offered to rebut the employer's evidence that the employment decision was non-discriminatory and thus legitimate, as it apparently was in this ADEA case, or as part of the employee's attempt to establish *prima facie* employer discrimination, typically in Title VII disparate impact cases.

determine whether the statistical evidence was "meaningless," *i.e.*, irrelevant, since devoid of probative value under Fed. R. Evid. 401 and 402. Although the district court properly charged the jury that in considering the value of the experts' testimony it should take into account the facts on which their opinions were based and whether "their facts are in fact facts," app. at 378, the court should have excluded the statistical evidence itself.[7] While a jury makes factual determinations, it surely does not undertake to make the legal determination of whether an analysis controls for "minimum objective qualifications." What happened here is clear. Prejudicial irrelevant evidence was admitted which the jury was told to disregard if it made findings of law going not simply to weight but to admissibility. Here the only charge to the jury regarding the statistical evidence that would have been correct would have been an instruction to disregard it. The district court in this case wrongfully relinquished its function as the judge of the law, which includes the obligation to pass on the admissibility of evidence, to the jury. The threshold question of the admissibility of statistical evidence is simply not subject to conditional admissibility under Fed. R. Evid. 104(b).

I agree with the majority's observation that while this is an individual disparate treatment case, it has been in class action disparate impact or disparate treatment cases in which the law regarding statistical

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7. Although Bruno contends that defendants presented no evidence concerning the minimum qualifications of the positions covered by the studies, she herself testified at trial about the skills required for some of these positions. *See* app. at 588-601. In any case, the party seeking to introduce evidence has the burden of demonstrating that it is relevant so as to be admissible. *See* 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5166, at 69 n.20 (1978).

evidence has largely developed. Typescript at 14-15. The majority further points out that in an individual disparate treatment case statistical evidence, though helpful, will ordinarily not be dispositive, and with this I also agree, as in an individual treatment case the evidence will focus on the particular plaintiff rather than an overall class.

However, I part company with the majority's conclusion that statistical evidence, irrelevant because inherently unreliable, can, somehow, in a different context, be relevant. The point is that the statistical evidence, whether introduced in a class action disparate treatment or impact case or an individual disparate treatment case, has the same purpose: to support the position of a party in a case involving a claim of discrimination. Thus, here the district court instructed the jury in its charge that Bruno's statistical evidence was offered in support of her case. At most, the distinction between class actions and individual disparate treatment cases could be the basis for a harmless error analysis when flawed statistical evidence is admitted, but on the record here the evidence was not harmless and the majority does not undertake a harmless error analysis. Rather, it writes:

> The statistical evidence in this case is being used to bolster the plaintiff's case that the defendants' articulated reason for an individual employment decision is a pretext. Even though it does not account for the minimum objective qualifications of the positions into which transfer or promotion was possible, we conclude that the studies are 'relevant.'

Typescript at 15.

Liability in this case was sharply disputed, and the outcome clearly could have been a verdict for the

defendants. The door is now open in this circuit to the admission of plainly irrelevant statistical evidence in individual disparate treatment cases. What else can be concluded from an opinion upholding the admission of statistical evidence which is acknowledged not to account "for the minimum objective qualifications of the positions into which transfer or promotion was possible"?

I have not ignored the majority's conclusion that the defendants' objections to the statistical studies were not properly preserved. Typescript at 16-17. The majority, however, reaches this conclusion only with respect to the new hires and termination studies inasmuch as it reaches the merits of the defendants' objections to the transfer and promotion study of persons over 40 as compared to those under 40.

In any event, the termination and new hire studies, even if valid, are of remote interest at best in this case. While there can be no doubt that Bruno's prior position as Director of the Central Order Processing Department was terminated, that was because it was eliminated as a result of a management decision not in issue here. Bruno's complaint is that she should have been given the position of Manager of Clinics Fulfillment, the position awarded to Dietrich. Accordingly, Bruno complains of a transfer decision. Thus, the transfer and promotion study is quite germane to this case while the new hires and termination studies have significantly less probative value.

Furthermore, as the majority acknowledges, even the new hires and termination studies were challenged by the defendants in a motion *in limine*. Typescript at 16. The majority, however, finds this presentation insufficient to preserve the issue because the district court did not rule on the motion, and thus "there could be no reliance factor in this case,"

transcript at 17, meaning that the defendants could not have relied on an earlier ruling thereby to excuse their failure to object when the evidence was presented. I simply cannot agree with this analysis. The district court knew full well what the defendants' position was on this issue. In fact, in its opinion on the defendants' renewed objections to the statistical evidence in their post-trial motion for a judgment notwithstanding the verdict or for a new trial, the district court simply wrote:

> Defendants also argue that Dr. Sullivan's studies were deficient. 'Statistical evidence is an appropriate method for establishing disparate impact as indirect evidence of age discrimination.' *Blum v. Witco Chemical Corp.*, 829 F.2d at 372. Defendant's argument goes to the weight of the evidence, which, of course, is an issue for the jury alone to decide. *See: Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 113 (3d Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 156, 98 L.Ed.2d 111 (1987).

App. at 517.[8]

The district court thus did not suggest that the objection to the statistical evidence had been waived. Furthermore, even Bruno does not contend that the defendants waived their objections to admission of the statistical evidence on the basis of relevancy for in her brief on this appeal she states the following:

> Defendants' objection to the admission of Plaintiff's statistical proofs is also waived since it is little more than a request for this Court to

8. This post-trial opinion treating arguments directed to the deficiency in the studies as going to weight rather than admissibility is consistent with its charge which gave the jury the function of making threshold admissibility determinations.

> judge the credibility of competing expert witnesses. Such 'sufficiency' arguments, *though presented as 'relevance' objections*, were waived by non-inclusion in Defendants' directed verdict motion.

Brief at 27-28 (emphasis added).

Clearly, a failure to argue on a motion for a directed verdict that certain evidence is insufficient to support a position is not a waiver of a prior objection that the evidence was not relevant.

I dissent for a second reason as well. As the Supreme Court pointed out in *Ford Motor Co. v. EEOC*, 458 U.S. 219, 102 S.Ct. 3057 (1982), in a Title VII case a plaintiff's duty to minimize her damages includes the requirement that she accept a substantially equivalent job offered by the defendant, failing which the accrual of back pay liability will be tolled.[9] This duty, however, does not require her to settle her claim against the employer in whole or in part, and thus she need not accept an offer contingent on compromising her claim against her employer.

Here the jury found that although Bruno was offered a position of Manager, Inventory Planning and Control, at Bellmawr, New Jersey, which was superior or substantially equivalent to the position of Manager of Clinics Fulfillment, she acted as a reasonable person in the circumstances in rejecting the offer. The majority indicates that the relevant interrogatory was designed "to address the question whether the offer . . . was conditioned on Bruno dropping her age discrimination claim." Typescript at 23. This is an understandable conclusion inasmuch as the district court in denying the defendants' argument in their post-trial motion that Bruno failed to mitigate her

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9. I agree with the majority and the parties that *Ford Motor Co.* applies to ADEA actions.

damages relied solely on her testimony that the Bellmawr position offer was contingent on her dropping her ADEA claim. This offer was made in October 1985, when Bruno was still employed as Director of the Central Order Processing Department. The majority explains that the jury was justified in its conclusion because Bruno testified that she was told that she had to drop her claim if she took the job and she took that to mean that "you better do it or they're gonna find a way to get rid of you." Typescript at 24.

The problem is, as the majority recognizes, typescript at 24, that Bruno subsequently was told in a written memorandum from William Wright of December 16, 1985, that the Bellmawr job offer "is not, and never was, conditioned on dropping your claim."[10] Bruno received this memorandum while the offer remained open and well before her May 1986, lay off. Accordingly, Bruno, at her option, could have been continuously employed by the defendants at a position at least substantially equivalent to that which she was losing. Therefore, it was her own intransigence which caused her damages.

The majority disposes of the defendants' contention on this issue by indicating that the memorandum "merely presents a question of credibility. Notwithstanding the memo, the record contains sufficient evidence to support the jury's

---

10. The germane paragraph in the memorandum reads in its entirety as follows:

> (4) The Bellmawr job offer is not, and never was, conditional on dropping your claim. If it was, the condition would necessarily have been stated in writing. In the absence of such, the state agency would have to decide whether acceptance of the job had bearing on the claim. This is not the Company's prerogative. I do not understand how your perception of this matter evolved.

conclusion." Typescript at 24-25. In a footnote the majority indicates that "[t]he defendants make no suggestion that Wright's memo gave rise to any new duty on Bruno's part." Typescript at 25 n.9.

The question of Bruno's continuing employment with the defendants, however, was subject to ongoing discussions and the defendants clearly contend that both before and after the December 16, 1985, memorandum the Bellmawr position was available to Bruno. Although the defendants claim that at most there was originally a misunderstanding regarding the terms of this offer, as they never made it conditional on Bruno's dropping her claim, I will assume that the offer was initially conditioned on her doing so. Nevertheless, the indisputable fact remains that while Bruno was still employed by the defendants, the Bellmawr position was open to her and she was told in writing that she could have it and still pursue her discrimination claim.

It is absolutely beyond my understanding how this written statement can be weighed against an earlier conversation and dismissed on a credibility basis. While I will not import the parol evidence rule into this opinion, I will simply say that obviously the written memorandum was controlling. Surely in light of that memorandum, even ignoring other questions concerning the validity of compromises of ADEA claims,[11] it cannot seriously be contended that if Bruno had taken the Bellmawr position the defendants, on the basis of an alleged compromise, could have successfully moved for dismissal of her ADEA claim. Furthermore, I am not impressed with Bruno's statement that she thought she would be fired if she took the new job and continued to press her claim. To start with, that understanding came

11. *See, e.g., Cirillo v. Arco Chemical Co.*, 862 F.2d 448 (3d Cir. 1988).

from the original oral offer which was superseded by the December 16, 1985, memorandum. In any event, if she were fired because she would not drop her claim, she would have had a new claim based on the retaliation. While I recognize that such a claim would be subject to proof problems, the same was true for her original claim.[12]

I have one final point with regard to the memorandum. Although it may well be that it was written on the basis of legal advice, what precluded the defendants from amending a previously unlawful offer to make it lawful? I should think that employers should be encouraged to amend conditional offers so as to come into compliance with the law. *Cf. Ford Motor Co. v. EEOC*, 458 U.S. at 229, 102 S.Ct. at 3064 (in a Title VII case defendants should be encouraged to make curative, unconditional job offers to claimants to bring themselves into voluntary compliance and end discrimination far more quickly than in litigation).

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12. I realize that the position Bruno accepted and then rejected required a somewhat longer commute than the position awarded Dietrich. But that did not stop Bruno from finding it acceptable, because, as the majority points out, she first took the position but changed her mind four weeks later. Typescript at 5. Obviously, the distance was no problem then. Furthermore, there was evidence that the Bellmawr commute was 45 minutes and thus the additional time for that commute over that to the Clinics Fulfillment position in Philadelphia could not have been substantial. Indeed, the majority does not even discuss the possibility that the commuting distance would have justified Bruno in turning down the Bellmawr position. In any event, if the jury could have made its finding that Bruno acted reasonably in rejecting the Bellmawr position because of the commuting distance, a new trial should be granted because the jury might nevertheless have made its finding that Bruno reasonably rejected the Bellmawr position on the basis of the offer being conditional on her dropping her claim. *See Bone v. Refco*, 774 F.2d 235, 242 (8th Cir 1985).

I have dissented on two bases. As the first, if adopted by the court, would lead to a new trial and the second to the entry of a judgment for the defendants, my dissent leads me to vote for entry of an order remanding the matter for entry of a judgment for the defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 88-1895

ADELINE M. BRUNO

v.

W.B. SAUNDERS COMPANY AND
CBS EDUCATIONAL AND PROFESSIONAL PUBLISHING,
A DIVISION OF CBS INC.,
Appellants

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge,* HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and SEITZ*, *Circuit Judges*

The petition for rehearing filed by Appellants W.B. Saunders Co., *et al.* in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied. Judge Greenberg would grant rehearing for the reasons set forth in his dissent. Judge Hutchinson would grant rehearing *in banc.*

By the Court,

DELORES K. SLOVITER
Circuit Judge

Dated: September 8, 1989

* Hon. Collins J. Seitz, Senior Circuit Judge, as to panel rehearing only.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ADELINE M. BRUNO

v.

W. B. SAUNDERS COMPANY AND CBS EDUCATIONAL AND PROFESSIONAL PUBLISHING, A DIVISION OF CBS, INC.

CIVIL ACTION NO. 86-2282

FILED NOV. 1, 1988

OPINION

GAWTHROP, J.

In this employment discrimination case, defendants, W.B. Saunders Company and CBS Educational and Professional Publishing, a Division of CBS, Inc., have moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, following a jury verdict against the defendants in the amount of $850,000.00. Upon the following reasoning, I will deny defendants' motions.

Background

Plaintiff, Adeline M. Bruno, brought this claim against the defendants, alleging that they had discriminated against her on account of her age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (as amended). Specifically, plaintiff claimed that defendants discriminated against her when they refused to hire her for the position of Manager, Clinics Fulfillment. Defendants denied that they had discriminated against plaintiff and argued that, in any case, plaintiff had failed to mitigate her damages when she refused to take a position in Bellmawr

that the defendants had offered her. Following a trial, the jury found that (1) Ms. Bruno's age was a determining factor in defendants' decision not to select her for the position of Manager, Clinics Fulfillment; (2) that the discrimination was willful; (3) that the Bellmawr position was superior or substantially equivalent to the position of Manager, Clinics Fulfillment; but (4) that plaintiff had acted reasonably in refusing the defendants' offer of the Bellmawr job. The jury awarded plaintiff $150,000.00 in lost wages and benefits, and $700,000.00 in front pay. Immediately following the jury verdict, as shall be explained more fully later in the opinion, the jury heard after-discovered evidence, and were asked whether this evidence would cause them to change their verdict. They concluded that it would not.

Discussion

I. Defendants' Motion for Judgment Notwithstanding the Verdict

A judgment notwithstanding the verdict may be granted "only if, as a matter of law, 'the record is critically deficient from that minimum quantity of evidence from which a jury might reasonably afford relief.' " *Simone v. Golden Nugget Hotel and Casino,* 844 F.2d 1031 (3d Cir. 1988), *quoting Link v. Mercedes-Benz of North America, Inc.,* 788 F.2d 918, 921 (3d Cir. 1986). In deciding the motion, the prevailing party is entitled to the benefit of all reasonable inferences to be drawn from the evidence. *Bhaya v. Westinghouse Electric Corp.,* 832 F.2d 258, 259 (3d. Cir. 1987).

It is improper to grant a motion for judgment notwithstanding the verdict, unless the specific contentions have been made at the close of all the evidence, in a motion for directed verdict. *Bonjorno v. Kaiser Aluminum & Chemical Corp.,* 752 F.2d 802, 814 (3d Cir.), *cert. denied,* 477 U.S. 908 (1984). In the case at bar, defendants' counsel did not move for a directed verdict after the close of the after-discovered

evidence.[1] At the close of the evidence and before the first verdict, he did, however, so move, on two specific grounds: first, that plaintiff had failed to prove a *prima facie* case of age discrimination, because plaintiff had not shown that the person replacing her was "sufficiently younger" than she; and, second, that plaintiff had adduced insufficient evidence to rebut defendants' stated reasons for not hiring her. (N.T. April 28, 1988, at 904-905). It is these specific issues that I shall now address.

A. Did the plaintiff prove a *prima facie* case of age discrimination?

The defendants contend that plaintiff failed to prove a *prima facie* case of age discrimination. Specifically, they argue that the selection of one Beverly Dietrich, 36, over the 46-year-old Ms. Bruno, cannot, as a matter of law, support a reasonable inference of age discrimination, because Ms. Dietrich was not "sufficiently younger" than Ms. Bruno.

To establish a *prima facie* case of age discrimination, a plaintiff must prove that she "(1) belongs to a protected class; (2) was qualified for the position; (3) was dismissed despite being qualified; and (4) ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination." *Sorba v. Pennsylvania Drilling Co., Inc.*, 821 F.2d 200 (3d Cir. 1987), *cert. denied*, ____U.S.____, 108 S.Ct. 730, 98 L.Ed.2d 679 (1988).

I note initially that the fourth prong of this test has its origins in *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 793 (3d Cir. 1985), *cert. denied* 474 U.S. 1057 (1986), and was stated in the factual context where the person replacing the plaintiff was within the protected class—forty years old or over. The court reasoned: "If no intra-age group protection were provided by the ADEA, it would be of virtually no use to persons at the upper ages of the protected class whose jobs require experience since even an employer with clear anti-

[1] In their Reply Memorandum, defendants suggest that they also moved for a directed verdict on their claim that plaintiff failed to mitigate her damages after the jury returned its verdict. I disagree. The record reveals that no motion for directed verdict was made at that time.

age animus would rarely replace them with someone under 40." 766 F.2d at 792. In this case, by contrast, young Ms. Dietrich was not in the protected class; thus the "sufficiently younger" holding of *Maxfield v. Sinclair* does not here apply.

Beyond that, in my supplementary charge, made in response to defendants' *Maxfield v. Sinclair* request, I arguably gave defendants more than that to which they were entitled. I instructed the jury that "the person employed in Ms Bruno's stead . . . [must be] sufficiently younger to raise an inference of age discrimination." (N.T. May 11, 1988, at 50). Even in the face of that instruction, the jury found the decade's difference to make Ms. Dietrich sufficiently younger for plaintiff to carry the day.

Next, defendants argue that Ms. Bruno's testimony was not credible, and consequently it cannot give rise to a reasonable inference of age discrimination. Questions of credibility are within the exclusive province of the jury, *Bhaya*, 832 F.2d at 261, and they have found in plaintiff's favor. Moreover, by focusing solely upon plaintiff's testimony, ignoring the testimony of the other witnesses who supported plaintiff's allegations of age discrimination by her former employer, as well as the testimony of defendants' witnesses, as to which plaintiff successfully cast some doubt, defendants are being impermissibly selective.

B. Was there evidence on the record to rebut defendants' proffered nondiscriminatory reason for its actions?

Once the plaintiff has made out a *prima facie* case of age discrimination, the defendant must "articulate some legitimate, nondiscriminatory reason" for its conduct. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973). After the defendant has done so, the burden of production shifts to the plaintiff, who must show that the employer's stated reason was pretextual. *See: Anastasio v. Schering Corp.*, 838 F.2d 701, 705 (3d Cir. 1988).

Defendants contend that the record is devoid of evidence rebutting defendants' proffered explanation, that there was no discriminatory intent in selecting Ms. Dietrich over

Ms. Bruno. I cannot agree. Ms. Bruno had held a higher level in the company than Ms. Dietrich, and she also had experience in the Clinics Fulfillment job. Ms. Dietrich had none. In addition, one Ms. Allysa Korth testified on behalf of the plaintiff that the manner of posting the position of Manager, Clinics Fulfillment was done in such a manner to ensure that Ms. Dietrich received the job. (N.T. April 18, 1988, at 77). Finally, plaintiff presented the testimony of numerous witnesses who corroborated her account of age discrimination within the company, *see infra.* at 19, as well as expert testimony to that effect. Beyond that, there was much made of the manner of the two job interviews. Defendant's personnel manager, one Mr. Anthony Degutis, interviewed plaintiff in a small, drab office in the W.B. Saunders Building. The interview was described as quick and perfunctory. Ms. Bruno testified that Mr. Degutis

> sat there looking at his watch . . . [H]e acted like he was timing me and there was a complete lack of interest in his part . . . .
>
> [W]hen I brought up the business of the accounts receivable, I said to him, "Tony, do you realize that I have done a lot of other things in this company besides order processing?"
>
> I said, "You'll note them on my resume."
>
> And he said, "Addie, I didn't even look at your resume."
>
> He said, "but, hey, I know you've been around a long time."
>
> And that was it.

(N.T. April 19, 1988, at 282). By contrast, Mr. Degutis, age 37, invited Ms. Dietrich to the Ristorante La Buca, for somewhat longer than the twenty minutes accorded Ms. Bruno. The inference was vigorously propounded that Mr. Degutis's motive for choosing so chic a place for his job interview of Ms. Dietrich was less one of disinterested personnel professionalism than an interest in pursuing the interper-

sonal chemistry naturally arising between that relatively young man and woman. This pointedly cuts against defendants' contention that the record is devoid of evidence tending to rebut defendants' proffered explanation.

C. Did plaintiff fail to mitigate her damages?[2]

Defendants next contend that Ms. Bruno failed to mitigate her damages. Specifically, they argue that plaintiff acted unreasonably when she refused to accept the Bellmawr job the company offered her.

The burden of proving a plaintiff's failure to mitigate rests with the defendant. *Anastasio*, 838 F.2d at 705. Absent "special circumstances," a claimant usually forfeits the right to back pay "if he refuses a job substantially equivalent to the one he was denied." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232 (1982). However, the substantially similar job must not be conditioned upon plaintiff's foregoing claims against the employer. *Id.* at 232, n. 18. Here, plaintiff testified:

> [The Vice-President of Clinics Fulfillment] told me that it would be expected of me to drop my claim if I accepted this position and I told him that I knew what my rights were and I said, "Rick, I don't have to drop my claim in order to take this position. I want that Clinics job and I'm not gonna drop my claim just because I take this position."

(N.T. April 19, 1988, at 324-325). Accordingly, there was sufficient evidence for the jury to conclude that plaintiff acted reasonably in refusing the Bellmawr job offer. Thus, her refusal of the position did not constitute a failure to mitigate her damages.

In their motion for new trial, defendants further contend that this court erred by instructing the jury on the plaintiff's duty to mitigate her damages, arguing, in essence, that there was no evidence that plaintiff acted reasonably in refusing defendants' offer of employment. For the reasons stated above, I disagree.

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[2]Although this argument was not preserved in their motion for a directed verdict, I will nevertheless address the issue.

II. Defendant's Motion for a New Trial

A district court may grant a new trial if required to prevent injustice, or to correct a verdict that was against the weight of the evidence. *American Bearing Co., Inc. v. Litton Industries*, 729 F.2d 943, 948, (3d Cir.), *cert. denied*, 469 U.S. 854 (1984). With this standard in mind, I address plaintiff's multiple assertions of error.

A. Is a new trial warranted by the court's having instructed the jury on the *McDonnell Douglas* elements of proof?

Defendants argue that a new trial is required, because this court instructed the jury respecting the four-part *prima facie* test articulated by the Supreme Court in *McDonnell Douglas v. Green, supra.* In that case, the Court stated that a plaintiff could establish a *prima facie* case of discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. The *McDonnell Douglas* guidelines have been adapted to ADEA cases. *Maxfield*, 766 F.2d at 791. In accordance with these guidelines, I instructed the jury as follows:

> In deciding whether age was a determining factor in the decision respecting Adeline Bruno you may apply a four-part test.
>
> First, Adeline Bruno has the burden of proving by the preponderance of the evidence the following facts:
>
> (1) that she was over 40 at the time of her application for the Clinics Fulfillment position;
>
> (2) that she was qualified to do the job that she was seeking and that the defendant at that time was seeking applicants for that job;

(3) that despite her qualifications her application was rejected; and

(4) that after her application, the employer continued to consider applicants from persons of Adeline Bruno's qualifications or alternatively the defendant awarded the position to someone younger than Adeline Bruno.

* * * *

Once Adeline Bruno has satisfied you by a preponderance of the evidence of the elements which I have been discussing the burden then shifts to the defendant to articulate a reason, to produce evidence tending to show that Adeline Bruno's application was denied for a legitimate nondiscriminatory reason.

But note carefully that the burden of proof throughout the case remains on the plaintiff.

(N.T. April 29, 1988, at 17). Defendants cite *Nelson v. Green Ford, Inc.*, 788 F.2d 205 (4th Cir. 1986), in support of their contention that this court erred in articulating the Supreme Court's standard. This Fourth Circuit case, not binding, of course, upon this court, merely holds that the trial court does not err when it declines to instruct the jury according to *McDonnell Douglas;* it does not hold that it is error so to charge. Defendants have not cited any case law from this circuit or elsewhere, holding that a new trial is required where the jury is instructed in accordance with the Supreme Court's guidelines. Nor have they demonstrated any prejudice as a result of my instruction. Accordingly, I decline to grant a new trail on this basis.

B. Is a new trial required because of alleged fraud?

Defendants next contend is that the jury's verdict was procured through fraud. At the trial, plaintiff testified that her supervisor, Mr. William Wright, told her: "Addie, if I were you I think I'd've [filed an age discrimination claim] . . ., but if you ever repeat that I'll deny it." (N.T. April 19, 1988, at 323). In his closing argument, plaintiff's counsel, Geoffrey

B. Gompers, Esquire, argued that when Ms. Bruno went to New York to talk about the inventory job Bill Wright told her, "Addie, you're doin' the right thing by filing the claim."

> Don't you think they owed you an explanation to that?
>
> Don't they think they owed you an explanation for comments like old Saunders guard.

(N.T. April 28, 1988).

In my charge to the jury, I stated

> There has been some argument, here, ladies and gentlemen, about the failure or the alleged failure to call an allegedly available witness, Mr. Wright . . . . It is called the missing witness rule in the law.
>
> Basically what the rule stands for is if a party . . . fails to call a person who possesses knowledge about the facts in issue and who was reasonably available to him or her and who was not equally available to the other party, then you may infer that the testimony of that witness is unfavorable to the party who could have called him and did not.

(N.T. April 29, 1988, at 10-11). After I had concluded my initial charge, defendants' counsel, John H. Widman, Esquire, argued that the missing witness rule was inapplicable, claiming that

> Mr. Gompers knows that Mr. Wright was in the courtroom.
>
> THE COURT: There is no evidence to that effect.
>
> MR. WIDMAN: Mr. Gompers will stipulate to that fact.
>
> MR. GOMPERS: I don't—I don't know. Mr. Wright . . . .
>
> * * *
>
> MR. WIDMAN: I know he knows.

MR. GOMPERS: I do not.

THE COURT: But it is not on the record.

MR. WIDMAN: I believe it could be made a part of the record if he admitted to the fact that he asked me—

THE COURT: It is not evidence in this case . . . .

MR. WIDMAN: I understand.

(N.T. April 29, 1988, at 41).

While the jury was deliberating upon the verdict, Mr. Widman repeated his assertions, as follows:

MR. WIDMAN: Your Honor, after we adjourned . . . I went, first called Mr. Degutis. Mr. Degutis said that Mr. Wright was in the courtroom on Thursday.

I then called Mr. Wright who is in New York at Bantam Doubleday.

I have his phone number if the Court would like it . . . . I asked Mr. Wright whether Adeline Bruno saw him here in the courtroom on Thursday . . . . His response was . . . yes.

(N.T. April 29, 1988, at 55-56). There followed a dispute between counsel as to whether plaintiff and her counsel were aware of Mr. Wright's presence in the courtroom, and both plantiff and her lawyer took the stand, *in camera*, to deny such knowledge. Defense counsel was permitted to cross-examine both of them, which he did. I then called Mr. Wright, in New York, on the telephone, and placed him under oath, albeit at long distance. He testified that he was, in fact, in the courtroom at the time of the trial, and that Ms. Bruno spotted him, and said, " 'Hi Bill. How are you?' " (N.T. April 29, 1988, at 79). The initial questioning was by the court, but both lawyers were given a full opportunity to pose their own questions to the witness. Over plaintiff's objections, defendants' counsel argued that this information should be brought to the jury's attention, stating:

> [T]he jury believes right now that . . . Mr. Wright was . . . the defendants' witness and that defendant didn't call Mr. Wright because he would have admitted that he said what he said and what Miss Bruno says that he said. In fact, Mr. Wright was equally accessible to the plaintiff and defendant. It is now an issue before the jury and I believe [it] will affect the jury's verdict in this case.

(*Id.* at 86). At this point, the plot quickly thickened: we were told that the jury had reached a verdict. I suggested to defense counsel that, if the jury verdict was for the plaintiff, it would still be possible to present them with the information that had just come to light, and let the jury

> go back and deliberate, whether in view of that fact that would have had an impact on the outcome of the case with regard to liability . . . .
>
> Your response?
>
> MR. WIDMAN: I would like [the court reporter] be permitted to read the testimony of Mr. Wright.

(N.T. April 29, 1988, at 86).

After the verdict was announced, I stated:

> Ladies, and gentlemen, I want to thank you for your service in this case.
>
> I want to tell you that we have had an unusual development and the trial is not yet over.
>
> * * * *
>
> You will recall during Mr. Gomper's summation and during my charge there was some mention about the failure to call a witness, . . . Mr. William Wright . . . .
>
> Ladies and gentlemen, we have had some after-discovered evidence in this case which raises some question as to whether Mr. Wright was not equally available [to both sides] . . . .

(April 29, 1988, at 96-97). I then permitted counsel to present evidence of Mr. Wright's presence in the courtroom. Ms. Bruno and her counsel both testified, without objection, that they had not seen Mr. Wright in the courtroom; and Mr. Widman was again permitted to cross-examine them. The jury was played a tape recording of Mr. Wright's just-given telephonic testimony, in which he had denied Ms. Bruno's assertion that he had told her that she was right in filing suit, and in which he described how she had recognized him in the courtroom.

I then invited counsel to side bar where I showed them the interrogatory I had prepared for the jury. The only objection to this interrogatory came from plaintiff's counsel, who stated:

> MR. GOMPERS: Your Honor, I would ask that the interrogatory be phrased only towards liability . . . .
>
> THE COURT: Do you agree with that?
>
> MR. WIDMAN: Yes, I agree with that.
>
> THE COURT: Very well. I shall amend it.

(N.T. April 29, 1988, at 111). I then permitted counsel to make a second set of closing arguments, directed to the after-discovered evidence, and I gave a brief supplemental charge on the issues of the missing witness rule, and the doctrine of prior inconsistent statements. I posited the following question to the jury:

> Having heard this after-discovered evidence, would it cause you to change your verdict . . . in this case?

(N.T. April 29, 1988, at 117). Counsel for defendants objected neither to the interrogatory nor to the court's charge. Once again, the only objection came from plaintiff's attorney, who contended, as he had throughout the proceedings, that to permit the jury to hear the after-discovered evidence would be unfairly prejudicial to his client. (N.T. April 29,1988, at 56, 87-90, 121).

After the jury deliberated for a second time, for about seven minutes, they concluded that the after-discovered evidence would not cause them to change their verdict.

I emphasize that throughout this incident, defendant's counsel had no objection to the procedure followed; indeed, the proceedings were a result of his input and urging. The court granted defendants' requests to cross-examine plaintiff and her attorney, twice, during the course of these proceedings. The court also granted defendant's request to present the after-discovered evidence before the jury. Defendant did not, at any time following the discovery of the this evidence, move for a mistrial, or for a judgment notwithstanding the verdict. He was content to let the jury decide the matter. They have done so, in plaintiff's favor. That the defense is now, after the fact, disappointed with the second verdict, does not permit me to undo it, nor the first one.

C. Are defendants entitled to a new trail on the basis of the court's instructions on liquidated damages?

Defendants also contend that this court erred in its instructions to the jury concerning liquidated damages. Liquidated damages are "punitive in nature, intended to deter future violations." *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 382 (3d Cir. 1987). Thus, the Third Circuit has required that there be outrageous conduct on the part of the defendant before such damages are imposed. *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 658 (3d Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 1348, 94 L.Ed.2d 519 (1987). In my instructions, I stated that

> [y]ou must find that defendants acted willfully in discharging Adeline Bruno . . . and accordingly . . . if you find that defendants acted willfully, that she is entitled to an award of twice her normal award, and you can do this if you find that Adeline Bruno has proven by a preponderance of the evidence that Tony Degutis knowingly or reckless allowed age to be one of the determining factors in his decision to select Beverly Dietrich for the position over Adeline Bruno.

(N.T. April 29, 1988, at 37). I further instructed the jury that "there must be more than an intentional discrimination, . . . the discrimination must be so blatant as to constitute outrageous conduct on the part of the defendant . . . ." (N.T. April 29, 1988 at 49). Defendants' counsel had no objection to the supplemental charge, and in fact expressly requested it. I again emphasized the requirement that they find outrageous conduct for there to be willfulness, at the time the jury requested further clarification of the court's liquidated damages instruction:

> THE COURT: Good afternoon, ladies and gentlemen. I have yet another epistle from your inner sanctum which reads as follows:
>
> If the age discrimination is determined to be willful must we give the doubled amounts for answers 5 and 6?
>
> With the caveat, the cautionary remark, of course, which I said at the end of my charge, that willfulness as defined here in this legal context pertains to outrageous conduct, my answer to your question is, yes.

(N.T. April 29, 1988, at 77). Accordingly, I decline to grant a new trial on the basis of this argument.

Defendants also contend that the court erred in instructing the jury that liquidated damages may be awarded on back pay and front pay. In my charge, I stated:

> Accordingly, if you find that Adeline Bruno has proven by a preponderance of the evidence that defendants acted willfully in discharging her . . . she is entitled to recover twice the total dollar amount of the actual damages including back pay, front pay, lost pension benefits and lost employment benefits which you find that she is otherwise entitled to recover.

(N.T. April 29, 1988). In *Blum v. Witco Chemical Corp., supra.*, the district court had held that front pay was not

subject to liquidated damages, reasoning that the purpose of the statute was to ensure compensation to plaintiffs for the delay in receiving back pay. The Third Circuit of the Court of Appeals disagreed with the trial court's reasoning, stating that while

> one purpose of a liquidated damage award is to compensate the plaintiff for the delay in receiving back pay and benefits . . . , liquidated damages are also punitive in nature, intended to deter future violations. *Trans World Airlines v. Thurston*, 469 U.S. 111, 125, 105 S.Ct. 613, 623-24, 83 L.Ed. 2d 523 (1985). Those punitive aspects would be served by awarding liquidated damages based on both back pay and prospective damage awards.

829 F.2d at 382. Although the Third Circuit refrained from actually reaching the issue, its reasoning, albeit in dictum, is compelling, and I, therefore, decline to grant a new trial on this ground.

Finally, defendants contend that this court erred in instructing the jury on the issue of willfulness, arguing that there was no evidence on the record to support a finding of outrageous conduct. I disagree. There are a number of factors the jury may have taken into account in finding that outrageous conduct had occurred, including: (1) plaintiff's testimony that defendants offered her a job in exchange for her dropping her age discrimination suit (N.T. April 19, 1988, at 324-25); and (2) the disparate treatment of Ms. Bruno and Ms. Dietrich at the time of their respective interviews, particularly in light of Mr. Degutis's admission that, when he asked Ms. Dietrich to LaBuca, he felt she "was not qualified for the job . . . ." (N.T. April 20, 1988). Finally, I note that plaintiff presented the testimony of numerous witnesses who opined that they had not received positions within the company solely because of their age, *see, e.g.*, Testimony of Ann Martino, N.T. April 19, 1988, at 128-129, 138, 144; Testimony of Ms. Veronica Goodwin, (N.T. April 19, 1988, at 187), and that the method of posting the position of Manager, Clinics Fulfillment was done in such a manner to

ensure that Ms. Dietrich received the job. (Testimony of Ann Martino, April 18, 1988, at 77). The jury could have inferred from these witnesses's testimony that the company had a policy of not hiring older workers and had, in effect, stacked the deck against Ms. Bruno before she had to chance to apply for the position. *Cf. Dryer v. Arco,* 801 F.2d at 658 ("systematic purging of older people from the employee staff" might warrant imposition of double damages). I conclude, therefore, that there was sufficient evidence from which a jury could have found outrageous conduct on behalf of the defendants, and, consequently, the court did not err in instructing the jury in this regard.

D. Plaintiff's expert testimony.

Defendants contend that plaintiff's expert, Dr. Brian P. Sullivan, was not a qualified expert, and that the admission of his testimony was improper. Under Rule 702 of the Federal Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." There is a "presumption that expert testimony will be helpful." *In re Japanese Electronics Products Antitrust Litigation,* 723 F.2d 238, 279 (3d Cir. 1983), *rev'd on other grounds,* 475 U.S. 574 (1986). At trial, Dr. Sullivan testified that he had a background as an economist, with extensive experience in statistical analysis. (N.T. April 20, 1988, at 457-459). He also stated that he had previously testified as an expert in economics and statistics in Labor Department hearings, before regulatory commissions, and in various court cases. (N.T. April 20, 1988, at 459-460). This is sufficient for him to be qualified as an expert in economic statistics. It was a proper exercise of the court's discretion to admit the testimony, with the jury permitted to give it whatever weight, if any, that it chose. *See: Davis v. Combustion Engineering, Inc.,* 742 F.2d 916 (6th Cir. 1984).

Defendants also argue that Dr. Sullivan's studies were deficient. "Statistical evidence is an appropriate method for

establishing disparate impact as indirect evidence of age discrimination." *Blum v. Witco Chemical Corp.*, 829 F.2d at 372. Defendant's argument goes to the weight of the evidence, which, of course, is an issue for the jury alone to decide. *See: Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 113 (3d Cir.), *cert. denied*, ____ U.S. ____ 108 S.Ct. 156, 98 L.Ed.2d 111 (1987).

Plaintiffs also contend that the court erred in admitting the testimony of Dr. Samuel J. Kursh, who testified, at trial, on the amount of plaintiff's back pay and front pay damages. Defendants expressly stated at trial that they had no objections to Dr. Kursh's qualifications, (N.T. April 21, 1988, at 596), and their brief contains no reasoning as to why his testimony was unfairly prejudicial to defendants. Accordingly, defendants' argument must fail.

E. Did the court err by instructing the jury as to a pattern of discrimination?

Defendants next argue that the court erred in instructing the jury that plaintiff could establish age discrimination "by showing that defendants engaged in a pattern or practice of discrimination against their employees or prospective employees on account of age . . . ." (N.T. April 29, 1988, at 19). Defendants do not contend that the instruction misstated the law; rather, they suggest that it was in error, because

> there exists no admissible evidence in the record for a pattern or practice of discrimination. Dr. Sullivan's meaningless "statistical studies" don't even deserve the Court's consideration in this regard. His unqualified and unfounded "expert" conclusions of rampant age discrimination at [W.B. Saunders] seriously prejudiced defendants, however.

(Defendants' Memorandum in Support of Defendants' Motion for Judgment Notwithstanding the Verdict or for a New Trial, at 47-48). As I have already stated, Dr. Sullivan was qualified to be an expert witness; the weight to be

accorded his studies was for the jury to determine. The defense called one Dr. Paul L. Andrisani, an expert, who set forth his own view of the statistical pattern, and severely criticized Dr. Sullivan's analysis. The sorting out of those studies was entirely for the jury. Accordingly, I decline to grant a new trial on this ground.

F. Did the court err in excluding evidence of Ms. Dietrich's post-hiring performance?

Defendants contend that the court erred in excluding testimony concerning Ms. Dietrich's performance as Manager of the Clinics Fulfillment department after she was formally appointed to the position. (N.T. April 20, 1988, at 449). Defendants have cited no authority for the proposition that a jury should examine the job performance of a person selected over a plaintiff in an age discrimination suit, after the allegedly discriminatory hiring; nor have they articulated any rationale for such a rule. I did permit defendants to offer testimony concerning Ms. Dietrich's job performance during the testing period.

To have permitted evidence of her post-hiring performance would have countenanced the admission of irrelevant evidence. It would have been tantamount to determining, in a criminal case, for example, that because the execution of the search warrant disclosed drugs, ergo there must have been probable cause for the issuance of the warrant. The test, of course, is what information did the magistrate at the time he issued the warrant. Similarly, in the context of employment discrimination, the inquiry is limited to the empirical knowledge of the employer at the time he made the hiring decision. Hindsight bootstrapping is impermissible. I thus decline to grant a new trial on this ground.

G. Other alleged errors.

Defendants next contend that the court erred when it instructed the jury as follows:

> In this case evidence was presented that Beverly Dietrich commanded a lower salary for the Clinics position than would have been required if Adeline Bruno was awarded the job.

> It may therefore be inferred that Beverly Dietrich was selected for the job over Adeline Bruno on account of economic reasons.
>
> Where economic savings are directly related to an employee's age, however, it is a violation of the Act not to hire an older employee for those reasons.
>
> Stated another way, if you believe that economic conditions played a significant part in the decision to discharge Adeline Bruno, and if you believe that the economic savings to the company were an age-related factor which induced the defendants to hire Beverly Dietrich for economic reasons rather than an older employee such as Adeline Bruno, then Adeline Bruno is still entitled to prevail on her claim.

(N.T. April 29, 1988, at 25). Defendants contend that this instruction somehow suggests that age and salary were correlated at W.B. Saunders Company. They argue that the instruction was erroneous, there being no evidence that age and salary were correlated at the company. Defendants' argument must fail, because, as the above language reveals, the instruction never stated that such a correlation existed at W.B. Saunders. What it does say is merely this: that W.B. Saunders achieved an economic savings by hiring Ms. Dietrich, but whether the choice to hire her was based upon age or economic savings was an issue for the jury to decide.

Defendants finally contend that they are entitled to a new trial because of the delay between the completion of testimony and the commencement of jury deliberations. Before the start of trial, on April 18, 1988, I informed counsel I would be at the First and Third Circuit Judicial Conference, held in Charleston, North Carolina, during the final week in April. Neither counsel stated that he would be prejudiced by this delay; nor did defendants' counsel voice any objection to this delay, during the course of the trial. Thus, the issue is waived. Nor, in fact, do I find any prejudice.

Accordingly, upon this reasoning, defendants' motions shall be denied.

An order follows.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ADELINE M. BRUNO

v.

W. B. SAUNDERS COMPANY AND CBS EDUCATIONAL AND PROFESSIONAL PUBLISHING, A DIVISION OF CBS, INC.

CIVIL ACTION NO. 86-2282

O R D E R

AND NOW, this 31st day of October, 1988, Defendants' posttrial motions are DENIED.

BY THE COURT:

ROBERT S. GAWTHROP, III

Robert S. Gawthrop, III. J.

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

CAPTION: HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC. Petitioner V. EUGENE F. BRIECK

CASE NO: 87-271

PLACE: WASHINGTON, D.C.

DATE: October 31, 1988

PAGES: 1 thru 53

ALDERSON REPORTING COMPANY
20 F Street, N.W.
Washington, D.C. 20001
(202) 628-9300
(800) 367-2376

the judgment itself so as to allow a jury then to infer discrimination. Thank you very much.

QUESTION: I'm sorry that that wasn't the question you presented to us when you asked us to take this case. The question presented is set forth in your petition is whether a plaintiff who alleges intentional discrimination can survive summary judgment merely—merely by questioning his employer's business judgment without presenting any evidence, direct or indirect, that his employer's judgment was, in fact, motivated by an intent to discrimination. That's an interesting question. What you've just been talking about isn't.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kramer. The case is submitted.

(Whereupon, at 1:53 o'clock p.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-8300

Supreme Court, U.S.
FILED
DEC 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

W.B. SAUNDERS COMPANY and CBS EDUCATIONAL AND PROFESSIONAL PUBLISHING, a Division of CBS Inc.,

Petitioners,

vs.

ADELINE M. BRUNO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GEOFFREY B. GOMPERS
Attorney for Respondent
215 South Broad Street
Philadelphia, Pennsylvania 19107
(215) 790-0600

9979
Bartz Appellate Printers, Inc. • NJ (201) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114 DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

QUESTIONS PRESENTED FOR REVIEW[1]

I. Whether the Court should review a single plaintiff ADEA jury verdict which is amply supported by direct, circumstantial, statistical and anecdotal evidence, and which specifically links proof of employers' pretext to age motivated discrimination?

II. Whether the Court should review the District Court's decision to admit statistical studies under Rule 401 of the Federal Rules of Evidence in a single plaintiff ADEA case, where these studies control for most, but not all, factors involved, and where:

a. the petitioners failed to maintain and/or *withheld from discovery* (relying on "relevancy" objections) information concerning omitted factors at issue; and

b. the surrounding facts and trial testimony corroborated the accuracy of the studies and the relative non-importance of the omitted factor; and

c. the surrounding facts and trial evidence taken together substantially supported the ADEA jury verdict?

III. Whether the record contains factual support for the jury's finding by way of special interrogatory that Adeline Bruno "acted as a reasonable person would under the circumstances . . . when

---

1. Respondent has rewritten the deceptively worded statement of "Questions Presented" contained in petitioners' petition. As was the situation in *Harbison-Walker Refractories, Inc. v. Brieck*, 109 S. Ct. 546 (1988), where certiorari was dismissed as being improvidently granted, these petitioners have misrepresented the trial record in a blatant attempt to seduce this Court into granting certiorari. The issues promised by petitioners may sound "interesting" [Pet. i], but they cannot be delivered given the respondent's strong factual record of age motivated bias.

she rejected [petitioners'] job offer," where this jury was properly instructed on the law of mitigation as stated in *Ford v. EEOC*, and where:

a. this issue was waived by failure to include it in a motion for a directed verdict;

b. petitioners' replacement job offer was conditioned upon respondent withdrawing her ADEA claim; and

c. the proposed job location was over an hour from respondent's home and was inaccessible to her by transportation methods reasonably available to a non-driver?

LIST OF PARTIES

The parties to the proceedings below were the respondent, Adeline M. Bruno, an adult individual, and the petitioners, W.B. Saunders Co., a Division of CBS Educational and Professional Publishing, a wholly owned subsidiary of CBS, Inc.

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No. 89-857

In The

Supreme Court of the United States

October Term, 1989

W.B. SAUNDERS COMPANY and CBS EDUCATIONAL AND PROFESSIONAL PUBLISHING, a Division of CBS Inc.,

Petitioners,

vs.

ADELINE M. BRUNO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Adeline M. Bruno, the respondent, respectfully requests this Court to deny petitioners' petition for a writ of certiorari seeking review of the Third Circuit's opinion in this case. That opinion is reported at 882 F.2d 760.

OPINIONS BELOW

Adeline Bruno instituted this action in the U.S. District Court for the Eastern District of Pennsylvania in April of 1986, after her employer, W.B. Saunders Co. denied her a position as Manager, Clinics Fulfillment ("Clinics" job). After a seven day trial, a jury issued by way of special interrogatories specific findings that "Bruno's age was a *determining factor* in petitioners' decision not to select her" for the Clinics job, and that petitioners' actions were "willful." The jury awarded Bruno $75,000 back pay damages and $350,000 for lost front pay. Liquidated damages were then assessed to double this award.

The Third Circuit affirmed the judgment in a 2-1 decision on August 14, 1989. Though affirming the case, the court reduced the verdict to $500,000 by ruling that liquidated damages were not proper on front pay. Importantly, *neither* the majority, nor the dissent, questioned the sufficiency of Bruno's evidence of either intentional or *willful* discrimination.[2]

In this regard, the jury, trial court, and Court of Appeals could all rely upon ample *direct* evidence of age bias, as well as on a variety of circumstantial, anecdotal and statistical proofs. The direct evidence included statements by Company management labeling older employees as "old guard" or "old Saunders' guard" [701][3] *and* executive, Tony Degutis' sarcastic remark to Bruno

---

2. The dissent limited its review to a relevancy question concerning one of respondent's six statistical proofs and to an apparent misunderstanding of the evidence regarding respondent's mitigation efforts. Nowhere in either opinion is there support for petitioners' suggestion [Pet. 3-4] that respondent's was a bare bones case, with Bruno offering "only the bare statistic of her age (46) and Dietrich's age (36)."

3. References to the appellate appendix, petitioners' certiorari appendix and petitioner's brief are respectively noted [__], [A__], and [Pet. __] with an appropriate page number listed.

that she had "*been around a long time*" [A46]. Degutis made this last remark to Bruno while interviewing her for the Clinics job, the denial of which gave rise to this litigation. The Third Circuit also noted a damaging statement by Bruno's superior, Bill Wright. Wright told Bruno:

> "off the record" that if he had been her, he would have pursued an age discrimination claim . . . [but] "if you ever repeat that, I'll deny it."

882 F.2d 769; *see also, Graham v. Leopold*, 779 F.2d 170, 173 (3d Cir. 1985) (statement to employee to "get a lawyer and fight this thing" provides direct evidence of age bias).

STATEMENT OF THE CASE

On April 29, 1989 the District Court instructed the jury in this case as follows:

> In order for you to conclude that there was a violation of the Age Discrimination in Employment Act you *must* find that plaintiff's age . . . was a *determining factor* in her not being selected for the job . . . . In different words you must find that *but for* her age she would have been selected [380].

[Emphasis added.] Bruno met this burden by presenting a compelling mixture of direct, anecdotal, circumstantial and statistical evidence. The Third Circuit affirmed the trial court's entry of judgment on the jury verdict observing that this "variety of evidence . . . tends to rebut the Defendants' articulated reasons" [882 F.2d 766], while the District Court noted:

> plaintiff presented the testimony of numerous

> witnesses who opined that they had not received positions within the company solely because of their age, . . . and that the method of posting the position of Manager, Clinics Fulfillment was done in such a manner to ensure that Ms. Dietrich [a younger candidate] received the job . . . . The jury could have inferred . . . that the company had a policy of not hiring older workers [A56-7].

A. Factual Background

Petitioners' Statement of the Case grossly distorts the evidentiary record below, and relies upon matters which were not proven at trial. Rather than relying upon petitioners' false account of economically motivated layoffs, a fair review of this case requires consideration of much more. For eleven years, Adeline Bruno was an exceptionally able, diligent and hard working part of W.B. Saunders' management. From her first employment with Saunders in 1974 at $10,000 per year, Bruno's work record was sterling, and her personnel file exhibits a steady, upward rise in responsibility, job position, and salary. During her tenure, she received four promotions, fifteen salary raises, and twice, she was honored as the exceptional employee at petitioners' company. These awards (CBS Employee Achievement Award and Saunders' Outstanding Employee Award) were given to Bruno as recently as a few months before her layoff announcement. These honors recognized her "commitment and excellence beyond the normal requirements of [her] position".

At termination in May 1986, Bruno was a level 9 Director[4] of Order Processing. She held this title since 1977, supervising 75 workers, and earning $44,350.00 annually. Her work file

---

4. The Company hierarchy had supervisors reporting to managers, managers to directors, and directors to vice presidents.

describes her as an "efficient" manager having "excellent job knowledge," "sound judgment," and a "conscientious attitude" [831-49].

1. The Layoffs

In May 1984, CBS, Inc. announced the layoff of 110 jobs from its Philadelphia publishing subsidiary, W. B. Saunders Co. The announcement targeted for elimination certain company departments conspicuously containing large concentrations of older workers. By eliminating these ghetto departments of old people, under the guise of "business" justifications, Petitioners were able to terminate "old guard" employees in mass, and thereby attempt to circumvent the ADEA. In all, 59.1%[5] of workers fired were forty or older, whereas persons over forty comprised only 46.8% of the company's work force. *Not affected* were several departments, including the Clinics department, which contained mostly younger workers.[6] Bruno's job was one affected position.

The impending layoffs caused many older workers, including

---

5. Both sides agreed that these figures were accurate and statistically significant. Bruno's expert placed significance at 99.8% (*i.e.*, statisticians expect a difference as large or larger to occur randomly in only 1 of 500 cases). Moreover, since workers affected by the layoffs *already were employed in their jobs*, questions of "minimum objective qualifications" make no sense as a criticism.

6. Petitioners claim that older departments were eliminated for business reasons not applicable to younger departments; these reasons do not hold water. For example, the younger staffed Clinics department was retained, while Bruno's older Order Processing Department was eliminated. Petitioners explain this as a fortuity since they could save money by consolidating Order Processing with New York. If *consolidation* was truly a motivation, however, then *both* Clinics and Order Processing would have relocated since *they performed the same function*, one processing book orders, while the other, periodical subscriptions.

Bruno, to be apprehensive. This was so, since the company made prompt efforts to find transfer jobs for young employees (*i.e.*, Bill Boone, age 27 and Claudia Mattola, age 25) and little concern was shown for older workers (*i.e.*, Bruno, age 46, and Bud Henry, age 51). This so upset Bud Henry, a 35 year employee, that after losing two jobs to younger employees he complained to Company President, Bill Pesce, age 33, that

> people within the company who were about to lose their jobs were not given that little edge . . . I expressed concern . . . that it was not fair [752].[7]

In late 1984, Bruno learned that the level 8 Clinics job would soon be vacant in Philadelphia. This "Manager's" job was not affected by the layoffs, and the job appealed to Bruno since *she previously held that position for over three and a half years.*[8] Bruno viewed the Clinics opening as her golden chance to save her job; she immediately expressed interest and tried to apply. Petitioners *would not let Bruno apply* until the job was posted, even though it let another candidate, 36 year old Beverly Dietrich, submit an early application.

---

7. Petitioners used hard ball tactics against Bud Henry upon learning that he might testify for Bruno. Even though Henry's pension rights were only months away from becoming vested, they placed this worker with thirty five years of spotless service on a probationary status. When the trial was continued to permit further discovery, Henry's probation was likewise extended. Upon finally obtaining a job outside of the Saunders' division, Henry's boss, Beverly Dietrich acknowledged that they would have gotten along fine until "she learned that [he] was going to testify to her incompetence" [748-60].

8. Bruno managed the Clinics Department from April 1977 to 1980 and from 1982 to early 1983. During both periods she retained duties of also directing Order Processing.

Tony Degutis, age 37, was the company executive charged with filling the Clinics vacancy. His duty was to find the "best qualified" person [1008]. Degutis claims he had Bruno "in mind," and was "rooting" for her, while preparing the placement requisition; but he later chose Dietrich, a 36 year old, level 3 supervisor earning $19,773 per year [122, 788, 1010]. Degutis found Dietrich to be young, but *not* "qualified at the time that [he] started the interview process" [789]. Degutis says he selected Dietrich because of her "enthusiasm" [779].

At trial, Degutis said that he viewed Bruno as the "lead candidate" and "obvious" choice [778-83].[9] Bruno was the only applicant with "Director's" experience[10] and she was the *only* candidate to previously run the department. Bruno's experience in the job caused even Dietrich to admit that Bruno was viewed by the "consensus" as the best person to fill the job [1016].

2. The Posting

The Clinics posting occurred on December 17, 1984. From the outset, the evidence showed that the posting and interview processes were shams and that Degutis had *preselected* the younger, lesser qualified, Dietrich. Degutis did not post the job notice on the floor where Bruno worked. And while Degutis spoke with Bruno almost daily, and claimed to be "rooting" [122] for her, he avoided telling her about the posting. In fact, *Degutis waited until Bruno was on vacation* before posting the job, and then complained at trial of her "late" application [91]. Bruno was nonetheless the third of nine timely applicants.

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9. No applicant for the level 8 Clinics job, except Bruno (level 9) was above level 5. Dietrich (level 3) trained under Bruno's tutelage.

10. Four other candidates were Managers. Dietrich was a Supervisor.

The posting, itself, created suspicion. Degutis altered Personnel's usual job description in order to understate the job's necessary qualifications, and thereby permit lesser skilled applicants like Dietrich to apply. Absent from the posting was the normal *job requirement* that candidates have "management experience in publishing." On this point the Court below stated:

> the job description prepared for the opening . . . was unusual in that it did not include a requirement of "management experience." A jury could infer that the job description was intended to provide a justification for the selection of Dietrich.

882 F.2d 771. This was noteworthy as Dietrich was with the company only three years and was a "Supervisor," with no publishing experience at the manager's level. Previously she worked as a waitress, a sales clerk in the Junior Department at Bambergers, a cashier, and in a supermarket.

3. Special Treatment For Dietrich

Degutis admitted giving Dietrich preferential treatment [80, 112-5]. This favoritism towards an employee whose job was unaffected by layoffs, was in marked contrast to the treatment given the other applicants, *seven of whom were scheduled for termination*. Dietrich's initial interview lasted 90 minutes and took place at a chic restaurant called "La Buca."[11] After her interview Dietrich was placed in the job *during* the interview process, so as Degutis said, she could "prove herself" [731-2].

Bruno, on the other hand, was interviewed for only 20 minutes

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11. Other applicants were given short interviews. None were interviewed over lunch. They described their interviews as Degutis "going though the motions, somebody else had the job already" [670-1, 684-5].

in a vacant room. Bruno described her interview:

> [Degutis] sat there looking at his watch . . . [He] acted like he was timing me and there was a complete lack of interest on his part . . . . "When I brought up the business of the accounts receivable, I said to him "Tony, do you realize that I have done a lot of other things in the company . . . . You'll note them on my resume."
>
> And he said, "Addie, I didn't even look at your resume" [A-46].

When Bruno tried to describe her qualifications, Degutis cut her short, sarcastically commenting about her age that she had been "around" for a "*long time.*"

4. Dietrich's Preselection

Bruno left her interview with the realization that her interview was a sham and that Degutis, based on age, had manipulated the process so that he could justify giving the job to Dietrich. This was supported by the following:

> a. Bruno was given a twenty minute office interview while Dietrich was given two lengthy interviews including a 90 minute interview at La Buca [796, 93, 713];
>
> b. Degutis ignored Bruno during her interview and cut the interview short [713-720];
>
> c. The job requirements were altered and did not require "management experience" as being necessary for the level eight position [707-709, 657-659];

d. Dietrich was placed in the job during the interview process to let her "prove herself" [731, 736];

e. The level 8 Clinics job was given to Dietrich as a level 7 job without being reposted in accordance with Company policy, thereby underscoring Dietrich's lack of ability for a level 8 job [731, 736];

f. Dietrich earned $19,773 per year at the time of her interview and she was increased to $29,000 per year so as to meet the minimum salary requirements for this job; Bruno was already earning $43,350 per year [826];

g. *Degutis* referred to Bruno and other older employees as the "old Saunder's guard," indicating that they were "old fashioned" in their thinking [701, 686];

5. The Pretext

Bruno immediately contacted her superior, Rick Bates for advice on her disappointing interview. When Bates confided that Degutis did not think Bruno wanted the job, Bruno was shocked, and she resolved to correct his supposed misapprehension. First, she had Bates relay her interest to Degutis [264]. Then, Bruno approached Degutis herself, on several occasions, to express interest. Bruno stated:

> Tony, I really would like to talk to you about the Clinics thing . . . . Is there something about my interview that wasn't clear? [725-6]

Degutis told Bruno to "quit pushing" [726-8].

On March 25, 1985, Degutis advised Bruno that he gave the job to Dietrich. Degutis said that Dietrich, a level 3 supervisor,

was "more qualified" than Bruno [730]. He added that he knew Bruno and others would be upset with his choice, so that is why he let Dietrich prove herself in the job, and also why he let her interview with the company's young (age 33) president [729-31].

At trial, Degutis *added* two more reasons. He stated that Bruno was not enthusiastic and did not appear interested in the job [779]. Next, he claimed to be impressed with Dietrich's operation of the department during her testing period [801, 1025].

On cross-examination, however, Degutis either contradicted or recanted each of these rationales.[12] First, Degutis admitted that Bruno's record best qualified her for the job, and he acknowledged that both he, and other management, believed Dietrich "*was not qualified*" [A56]. Second, Degutis admitted that Bruno approached him on several occasions after the interview expressing interest in the job. He finally told her to "quit pushing" [726-8]. Third, Degutis' contention that he was impressed with Dietrich's job performance was belied by his inability to judge her either before or during the testing period. Degutis admitted to no knowledge of Dietrich *before* her application [65], and only a limited ability to observe her during the testing period as he *only went into the department twice to view her* [115-6].[13]

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12. Any discussion of pretext must start with Degutis himself who, *to help the company*, repeatedly perjured himself on the stand. *See* footnote 13, *infra*.

13. Degutis first testified that he went into the Clinic department to observe Dietrich "*daily if not every other day*" [115]. But when confronted with his earlier deposition he confessed that he only went into the Clinics department "*once or twice in the entire time of that interview process*" [115-6]. Degutis also tried to mislead the jury as to the authorship of the suspiciously worded Clinics posting by *denying* that he authored the job announcement [119-21]. However, at trial he was confronted with a preliminary draft *in his handwriting*, and he was forced to admit that the posting contained his words [119-21].

On May 2, 1986, Bruno was terminated. She pursued alternative employment with great vigor, but did not find employment for almost 11 months. In March, 1987 she took a job as a computer operator earning almost $25,000 *less* per year than she would have earned in the Clinics position.

6. The Bellmawr Job

In late 1985, after her EEOC charge was filed, Bruno was offered an "alternative" position with the Company in Bellmawr, New Jersey, as Manager, Inventory Planning. Bellmawr was over an hour away and petitioners knew Bruno feared driving since being injured in an accident. The court below however, found Bruno had reason to refuse this "bad faith" [882 F.2d 771] offer as it was conditioned on her dropping her ADEA claim. The Court of Appeals stated:

> A second interrogatory asked whether "the plaintiff act[ed] as a reasonable person . . . when she rejected the offer of the Bellmawr job." We understand this interrogatory to address the question whether the Bellmawr job was conditioned on Bruno dropping her age discrimination claim. The jury answered in the affirmative . . . .
>
> Bruno testified that Richard Bates, then Vice-President . . . told her "that it would be expected of me to drop my [[EEOC] claim if I accepted . . . and I took that to mean that — that you better do it or they're gonna find a way to get rid of you." [882 F.2d 770].

The Third Circuit concluded that "this evidence is sufficient to permit the jury's award." *Id.* at 770.

REASONS FOR DENYING THE WRIT

Petitioners have moved this Court to grant certiorari to review a series of falsely contrived issues which have no connection to the case at hand. In this respect, petitioners ignore the factual record below and instead present in a vacuum, issues which cannot be reached given the respondent's strong evidentiary record of age motivated bias. This record is recounted in the proceeding pages of this Response and it includes a variety of direct, anecdotal, circumstantial and statistical evidence which plainly demonstrates petitioners' intent to discrimate based upon age.

I.

THIS CASE DOES NOT RAISE THE FIRST QUESTION PRESENTED IN THE PETITION, SINCE THE RECORD BELOW CONTAINS SUBSTANTIAL, DIRECT AND INDIRECT EVIDENCE WHICH PROVED AGE TO BE A DETERMINING FACTOR.

By means of this petition this Court is being asked to second guess a jury verdict which found respondent's age to be the "but for" cause of her rejected job application. The question petitioners purportedly raise is whether a jury verdict will *always* be sustained when

> an employer favors a person under 40 over a plaintiff who is 40 or older, merely [by] questioning the business judgment of that employer [Pet. i].

This is a statement of the issue which perverts the opinion below and which cannot be reached given the substantial direct, circumstantial, anecdotal and statistical evidence of age bias contained in the record. This evidence does much more than merely *question* the petitioners' supposed business reason, it reveals quite

strikingly petitioners' *designed intent to deceive*, and then links that pretext to the ultimate issue of age.

Nonetheless by framing *their* issue in the way that petitioners have, petitioners hope to seduce this Court, through less than proper means, into believing that this case somehow presents "essentially the same question" [Pet. i] which the Court found "interesting" [A63] in *Harbison-Walker Refractories, Inc. v. Brieck, cert. dismissed as improvidently granted,* 485 U.S. 958 (1988). This case does not present that "interesting" issue at all, nor will it allow review of a bare bones *McDonnell-Douglas* case, which petitioners claim, falls below the minimum level of proof needed to sustain a verdict. This Court should be wary of the false promises now being presented by petitioners.

In 1988, this Court granted certiorari to review the Third Circuit's decision in *Harbison-Walker* as that company argued, that a bare bones allegation of pretext coupled only with the sole statistic that a claimant was over age forty, by itself, could not support an inference of age discrimination. Petitioners now contend that *this jury case* "presents the same substantial question" as *that summary judgment case* [Pet. 7]. Petitioners make this specious argument even though the jury in this case heard seven days of smoking gun evidence, including crucial evidence *linking proof of pretext to age discrimination*.

Importantly, the Court in *Harbison-Walker* vacated its grant of certiorari after discovering that it had been deceived about the nature of the issues and facts promised by *that* petitioner's application for certiorari. The Court did not appreciate having been *misled* by that petition, and upon discovering the deception, one Justice chided employer's counsel:

> I'm sorry that that wasn't the question you presented to us when you asked us to take this

> case. The question presented [a]s set forth in your petition . . . is an interesting question. What you've just been talking about isn't" [A62].

Ironically, by trying to entice this Court into believing that this case presents the "interesting" issue promised, but not delivered in *Harbison-Walker, petitioners repeat "essentially the same" deception made by Harbison-Walker, i.e.*, the issue promised cannot be delivered given the factual record of this case.

At the outset, this case presents *no* issue of substantial importance under the ADEA. What petitioners present instead is an impermissibly selective account of the case's factual history, and a transparent request for this Court to retry factual issues already resolved by the jury. This was not a case where the jury was asked to sit as a super-personnel department and second guess an employer's business reasons. To the contrary, Degutis' contradictory testimony revealed a *mens rea* intent to deceive about why he selected Dietrich. Not only did he mislead the jury about his authorship of the suspicious job posting, he deceived about his ability to observe Dietrich perform during the so-called testing period. Once Degutis recanted *on the stand* the entire thrust of his earlier testimony, the jury in this case had no choice but to find pretext. Moreover, given Degutis' remarks to Bruno about her "being around a long time" and being part of the "old guard," there was ample evidence linking his pretext to age bias. This was further confirmed by Wright's "off the record" comment that he too "would have pursued an age discrimination claim" given the circumstances. Moreover, given the suspicious job announcement, Degutis' refusal to advise Bruno of the posting, and the disparity in how Dietrich was treated in comparison to Bruno (including a lengthy lunch interview, a chance to prove herself in the job, and the interview with Pesce), the court below determined that the jury could reasonably have concluded that the entire interview process was a pretext and that Dietrich was

already preselected. The Third Circuit correctly noted:

> The message . . . [is *not*] that anyone who suffers an adverse employment decision can win a discrimination suit. The message is that Justice Rehnquist's words for the Supreme Court will be taken seriously: "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's action, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). This framework places a premium on truthfulness. [882 F.2d 766].

Petitioners next attempt to mislead this Court into believing that the court below mechanically applied *McDonnell-Douglas* in a bright line manner so as to require a jury to *always* infer discrimination from the mere "rejection of an individual over 40 in favor of an individual under 40" [Pet. 8]. Such a distortion ignores the court's discussion below of the "sufficiently younger" holding of *Maxfield v. Sinclair*, 766 F.2d 788 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057, where the Third Circuit stated:

> The probative value of the age of the replacement . . . will depend on the circumstances of the case. Although replacement by someone younger, without more, will not give rise to an inference of age discrimination, it has been noted that a substantial difference in the ages may . . . . [W]e see little basis for any concern that replacement by a slightly younger employee will give rise to an ADEA claim, since proof of replacement by a younger person is not conclusive

> of discrimination but is merely one element in a set of circumstances that may give rise to an inference. 776 F.2d at 793.

Based *in part* upon the ten year difference between Bruno and Dietrich, strong corroborating evidence, and the fact that Bruno was within the protected category while Dietrich was not, the court below concluded that the evidence "was sufficient to support an inference of age discrimination."[14] Moreover, in light of the court below's discussion of *Maxfield*, petitioners are hard pressed to find support for their ridiculous claim that this case presents "square and irreconcilable conflicts" with the decisions of other Circuits [Pet. 19]. In fact, petitioners' best case, *Bienkowski v. American Airlines*, 851 F.2d 1503, 1506 (1988) literally borrows the "sufficiently younger" standard from the Third Circuit's *Maxfield* decision for use by the Fifth Circuit.[15]

Petitioners' next complain that the trial judge erred by informing the jury of the circumstantial order of proof described in *McDonnell-Douglas*. This was done to explain the notion of pretext as a way in which Bruno could prove her case. As is evident, however, from page 3 of this Brief, the court's charge emphasized that Bruno's ultimate burden was to show:

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14. The jury in this case was twice instructed by the trial judge that when comparing the ages of Bruno and Dietrich, the jury should consider whether Dietrich "was *sufficiently younger* to raise an inference of age discrimination . . . . To reduce it *ad absurdum* if one — if they were two seconds apart in age. In the eyes of the law that wouldn't be enough to make it sufficiently younger" [408]. Thus, it is hard to determine why petitioners now claim grounds to complain.

15. Moreover, *Bienkowski's* criticism (851 F.2d at 1508, n.6) of *Chipollini v. Spencer*, 814 F.2d 893 (3d Cir. 1987) has no application to this case since respondent has done much more than merely refute the employer's reason, Bruno proved that age motivated the employer's action. *See* argument, *supra* at 15-16.

> . . . by a preponderance of the evidence that the age was a determining factor [and that] . . . plaintiff would not have been discharged *except for her age.*[16]

That petitioners oppose this information being given to the jury is ironic since it urges the jury to go *ignorant* of well established law. Moreover, petitioners' opposition was waived, since they *expressly agreed that the jury could have that charge in writing* [494], and also *prompted* the court to twice emphasize the "sufficiently younger" requirement of *Maxfield v. Sinclair.*

When stripped of its trimmings, petitioners' argument relies upon cases that do not support the proposition that *McDonnell-Douglas* should never be charged. Specifically, *Nelson v. Green,* 788 F.2d 205 (4th Cir. 1986) simply ruled it was *not error* to omit that charge *if* the court instructed on analogous concepts [*id.* at 209] and *that* opinion expressly approved of such a charge by calling counsel's request for the instruction a "reasonable petition." *id.* at 209. Moreover, petitioners' reliance on *Loeb v. Textron,* 600 F.2d 1003 (1st Cir. 1979), is misplaced since that case expressly held that

> [w]hether the jury is also instructed that the plaintiff must establish the four elements of the *McDonnell Douglas*-type prima facie case . . . will depend on whether the plaintiff's age discrimination claim is provable primarily in classic *McDonnell-Douglas* terms. [*Id.* at 1017-8].

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16. Importantly, the trial court never relinquished its responsibility of determining whether Bruno established a *prima facie* case. Only *after* it denied petitioners' summary judgment motion on this issue, and two separate directed verdict motions, did the court discuss this circumstantial method of proof as a way by which Bruno could meet her ultimate burden.

Given that petitioners' best authority actually supports the actions of the trial judge, the Third Circuit quite properly disposed of this issue by noting:

> [w]e do not believe the [*McDonnell-Douglas*] instructions here could have confused and misled the jury such that the defendants would be prejudiced. At worst, the jury instructions — which, taken as a whole, fairly and adequately described the shifting burdens . . . — presented the plaintiff with an additional obstacle, the possibility that the jury would find for the defendants on the basis that the plaintiff failed to make out a *prima facie* case [882 F.2d 768].

Petitioners also argue that the decision below "belies . . . fidelity" [Pet. 11] to *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715-16 (1983). But contrary to petitioners' claim, the decision below quite clearly focused its attention on the "ultimate issue" of

> whether the respondent proved by a preponderance of the evidence that age was a determinative factor in the employer's hiring decision [882 F.2d 764].

Given, however, that petitioners framed their appeal, not on the ultimate issue of age bias, but instead, on whether the ten year difference between Bruno and Dietrich was *sufficient* to create an inference of discrimination, and on whether *pretext was shown*, the Court of Appeals properly stated:

> Although we do not address [petitioners'] contention in terms of the *prima facie* case, it may be that our inquiry into the sufficiency of the evidence to support such an inference [of age discrimination] will not differ markedly from an

> inquiry into whether the plaintiff has introduced evidence sufficient to establish one of the elements essential to her *prima facie* case [882 F.2d 764].

Therefore, there is no infidelity to *Aikens*, and the petition for certiorari ought be denied.[17]

II.

THE RULING OF THE DISTRICT COURT IN ADMITTING RESPONDENT'S STATISTICAL EVIDENCE IS IN ACCORDANCE WITH THIS COURT'S DECISION IN *BAZEMORE v. FRIDAY* SINCE ALL *MAJOR* FACTORS WERE CONSIDERED.

Petitioners' second question would have this Court grant certiorari to resolve a *supposed* conflict in the Circuits as to when statistical studies are "admissible" [Pet. i]. It is ironic that petitioners frame their argument as an *admissibility* question, since none of the cases they cite focus on Rule 401 *relevancy* issues.[18] Instead, what is presented are a myriad of cases where various reviewing courts have questioned whether the *sufficiency of trial evidence* when *viewed as a whole* would permit a fact finder to infer discrimination. Ironically, none of these cases even reveals a situation where statistical studies were precluded *in limine*, and then had that preclusion affirmed on appeal. Therefore, there is

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17. Petitioners' final argument that employers will be forced to settle claims [Pet. 12] is somewhat ironic since this case continues to be litigated. The argument is also specious given that the mere proof of a *prima facie* case does not translate into a verdict since the ultimate burden of proving age bias remains with the plaintiff, and the jury remains free to decide for either party.

18. Petitioners attack the admissibility of only *one* of seven statistical studies viewed by the jury. The Third Circuit disposed of petitioners' criticisms of other statistical proofs by deeming them waived. 882 F.2d 767-8.

no "conflict in the Circuits" and the petition ought be denied.[19]

This distinction between the *relevancy* of statistical evidence and its *sufficiency* to support a verdict is a critical one that distinguishes the opinion below from the holdings of each case relied upon by petitioners. This Court noted that distinction in *Bazemore v. Friday*, 478 U.S. 385 (1986):

> While the omission of variables . . . may render the analysis less *probative* than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors "must be considered unacceptable as evidence of discrimination." *Ibid. Normally, failure to include variables will affect the analysis' probativeness, not its admissibility* [Emphasis added].

See Valentino v. U.S. Postal Service, 674 F.2d 56 (1982) (statistical model *not* flawed by failure to include grade levels as a variable); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984) (minimum objective qualification approach not read as hard and fast rule). In light of *Bazemore* it is clear that consideration of other transfer situations at Saunders was probative of how Bruno's transfer application was treated. Thus, the trial judge did not abuse his discretion by admitting the testimony.

In fact, even considering petitioners' argument as a claim that the statistical evidence was insufficient to support an inference of discrimination, this Court has always recognized that statistics gain relevancy not only from the numbers they state, but also

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19. Presumably petitioners frame this issue in admissibility terms since relevancy questions accord a plenary review, as opposed to the deferential review accorded to a jury's factual findings. *See* 882 F.2d 766.

from the surrounding facts which make them relevant. Thus, this Court has required courts below to not view statistics in a vacuum, but instead to consider them in light of "all the surrounding facts and circumstances." In *Segar v. Smith, supra* this Court stated:

> The minimum objective qualification approach should not, however, be read as a hard and fast rule; tests for the sufficiency of a Title VII prima facie case must not be applied in a "rigid, mechanistic, or ritualistic" way . . . *The ultimate test of sufficiency must remain that of Burdine, Teamsters, and Furnco:* did the plaintiffs offer evidence "adequate to create an inference that . . . employment decision[s] . . . [were] based on a discriminatory criterion" [Emphasis added].

Therefore, petitioners' attempt to view Bruno's statistics in isolation ought not be countenanced, especially in light of the strong direct and indirect evidence discussed, *supra*. Moreover, it was because of the need to consider the statistical studies in light of surrounding circumstances, that the court below distinguished between class action cases, which often rely *solely* on statistical comparisons, and single plaintiff cases where the statistically created inferences are usually supplemented with other proofs:

> [I]n individual disparate treatment cases such as this, statistical evidence, which "may be helpful, though ordinarily not dispositive," *id.* at 710, . . . Rather, "the usefulness of statistics will depend primarily upon their relevance to the specific decision affecting the individual plaintiff" . . . . *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977) (the usefulness of statistics "depends on all the surrounding facts

> and circumstances.") . . . [W]e conclude that the studies are "relevant." That is, as evidence they meet the requirement of Federal Rule of Evidence 401 that they "make the existence of any fact that is of consequence to the determination of the action more probable [882 F.2d 767].

In assessing the allegations made by petitioners, it is important to recognize that respondent does *not* concede that her studies were in any manner deficient, or that they failed to account for *major* factors. In fact, the record reveals quite strikingly that the studies *did* account for all *major* factors in light of historical employment considerations at W.B. Saunders.

Here the circumstances surrounding the statistics in question are revealing. First, petitioners' claim that the transfer study fails to account for minimum objective requirements is little more that a bare attempt to have this Court disregard decidedly *relevant* data based upon *unsworn* claims that some jobs required *specialized* training. Petitioners presented no testimony by anyone as to what these *mysterious* minimum qualifications might be.[20] Moreover, petitioners' own hiring practices belie any suggestion that "objective" qualifications were ever relied upon. In this regard the testimony of Degutis and Dietrich was that candidates were judged on *subjective* qualifications such as "enthusiasm" and "rapport";[21] "minimum objective requirements" were obviously not a consideration when petitioners offered Bruno the

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20. For example, petitioners do not indicate what qualifications, if any distinguish an applicant for a job in "International Customer Service" from one in "Trade Customer Service" or "Retail Customer Service."

21. In fact, on cross examination Dietrich stated that rapport was the reason she rejected 51 year old Bud Henry over the much younger, Jean Fannucci. Dietrich also admitted that rapport was virtually a euphemism for age, since she used rapport in selecting her friends who were all in her age group.

Bellmawr job since that job expressly required a "minimum 4-5 years of inventory management experience" where it was undisputed that Bruno had none. Likewise, minimum requirements were not a consideration when Dietrich was offered the Clinics job as it required previous "management experience in publishing," and Dietrich had none.

The simple fact, is that Bruno's Transfer model controlled for most factors, and all *major* factors. Given the company's express policy of filling vacancies from in house, the study was able to tightly control for the *size* and *content* of the applicant pool, its age composition, and the ages of the individual applicants for each job. The study eliminated from consideration workers who retired, quit or died so as to avoid irrelevant data. Finally, the study controlled for each available job opening.

Importantly, Bruno's study would also liked to have controlled for qualifications of each job applicant, but petitioners would not permit that. Bruno requested such information in discovery, but in response to interrogatories and motions to compel, petitioners ironically denied the "relevancy" of this factor. Then, when ordered to produce the information, petitioners stated:

> Due to the unavailability of much of the information relating to the employment history of each of the individuals . . . Saunders is unable to provide plaintiff with the prior employment of each such individual.

Importantly, this *unavailable* information is information which petitioners *were required to maintain* both by Section 29 of the Code of Federal Regulations as well as *by their own policy manual which reads as follows:*

> *Records Maintained* . . . may include application

> for employment . . . resumes, job histories . . . and appraisals . . .

That petitioners disobeyed their own policy manual, by destroying or concealing this information, in itself lends credibility to the results of the statistical studies. And were the court below, when faced with these circumstances, to have ruled that Bruno's studies were rendered irrelevant by the absence of this *unavailable* data, the signal that would be sent to employers is that they could now vitiate the ADEA, by destroying or concealing statistical data, and then attack the data's admissibility.

Nonetheless, given petitioners' allegation that these records did not exist, respondent proceeded on the reasonable assumption, that most, if not all, individuals applying for jobs would normally seek jobs that they felt they could perform, or at least quickly learn. Respondent believes this assumption is reasonable under the circumstances and allows the studies to remain probative, let alone relevant. Accordingly *certiorari* ought not be granted.

III.

THE RULING OF THE COURT BELOW ON RESPONDENT'S DUTY TO MITIGATE DAMAGES WAS PROPER AND IN SQUARE COMPLIANCE WITH THIS COURT'S DECISION IN *FORD MOTOR CO. v. EEOC.*

Petitioners' final issue presents the same kind of bait and switch deception present with their earlier issues. This is because petitioners *again* promise an issue not justified by the facts. Petitioners' game is to divert the Court's attention from specific jury findings (*i.e.*, that Bruno's job was offered *only* on the condition that she drop her claim), and to focus instead on an unsupported *assumption* made by the dissent below, that the "Bellmawr position was open" to Bruno at the time of Wright's

December 16, 1989 memorandum [882 F.2d 760]. The simple fact is that it was not. Trial Exhibit 16 speaks to this point since Wright wrote Bruno on November 20, 1985 as follows:

> To reiterate for you, the offer is for the position of Manager of Inventory Control, level 07 . . . . Please . . . let Ben or me know of your decision *by December 4* [Emphasis added].

After the December 4 deadline, petitioners, *for the first time*, issued the self serving statement that the job "is not, and never was, conditional on dropping your claim."[22] Interestingly, this memorandum *did not resurrect any prior job offer*[23], even assuming that its language could be believed. To the contrary, the wording spoke of the Bellmawr offer in the past tense, thus confirming that the offer was not being reissued:

> No one is aware of your request for a guarantee in writing. Quite frankly, if this was determinative in your accepting the job, *I would have* seriously *considered* the possibility [Emphasis added].

The simple fact is that the jury responded unanimously to a special interrogatory and declared that Bruno acted "as a reasonable person under the circumstances" when she rejected the Bellmawr job. That petitioners disagree with the jury hardly raises an issue of vital importance under the ADEA.

Moreover, the court's charge [389-94] on damage mitigation quoted lengthy passages from *Ford v. EEOC*. These verbatim

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22. The court below concluded that the job *was* so conditioned.

23. This point was confirmed by the majority which noted that "Defendants make no suggestion that Wright's memo gave rise to any new duty on Bruno's part." 882 F.2d at fn. 9.

quotations ensured compliance with this Court's teachings. The trial judge also stated:

> [Before] you may proceed to determine whether she is entitled to damages . . ., you must first determine whether she performed her legal duty to mitigate . . . . [Y]ou must decide whether under the same facts and circumstances a reasonable person would have rejected the defendants' offer . . . [If] a reasonable person . . . would not have rejected the job then you may not award plaintiff any damages [390-1].

Obviously, this passage closely paraphrases this Court's reliance in *Ford* on McCormick's *Handbook on the Law of Damages*:

> Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means *as are reasonable under the circumstances to avoid or minimize the damages.*

[Emphasis added.] *Id.*, 231 n. 15. Plainly then, the court's charge reflected the *Ford* holding.

Under *Ford,* a claimant, absent "special circumstances," usually forfeits the right to back pay "if he refuses a substantially equivalent job to the one he was denied." *Id., supra* at 238-9. However, the Court also stated in *Ford:*

> "The claimant's obligation to minimize damages in order to retain his right to compensation does not require him to settle his claim . . . . [or] to accept a job offered . . . on the condition that his claims . . . be compromised.

Here the record reveals *four* valid reasons for Bruno's rejection of the Bellmawr job. Any one prevents reversal since the court below could have affirmed on any basis supported by the record.[24] *Bernitsky v. United States*, 620 F.2d 948 (3rd Cir. 1980).

First, the court below noted that the Bellmawr offer was made in bad faith since Bruno testified that it was offered as *quid pro quo* for her dropping her claim. Bruno testified:

> Bates . . . told her "that it would be expected of me to drop my [EEOC] claim . . . and I took that to mean that — that you better do it or they're gonna find a way to get rid of you" [882 F.2d 770].

This reason alone suffices to uphold the jury's verdict under *Ford*. Moreover, the Bellmawr job, although similar to the Clinics job, was not substantially equivalent to jobs *previously held by Bruno* since she lacked the necessary "minimum 4-5 years inventory" experience. *See Ford, supra* at 232 ("claimant need not go into another line of work"). A third basis for upholding the verdict is that the Bellmawr job, a level 7, was a *demotion*, both from the Clinics and Order Processing Job. *Ford, supra* at 232 (claimant need not accept "demotion"). Finally, the record showed that the Bellmawr job was inaccessible to Bruno since it was over an hour from her home and was not accessible to the types of transportation available to a *non-driver*. *Ford v. EEOC, supra* at 239 n. 27 (employee need not move a great distance to accept a new job).

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24. It is important to note that this argument, of insufficient evidence to support the verdict, as to whether Bruno mitigated her losses, was *not* preserved by a directed verdict motion and therefore was waived. The appellate court addressed the merits as *dictum* "assuming this contention was not waived" 882 F.2d 770.

Thus, the jury's finding that Bruno acted reasonably in rejecting petitioners' offer, is supported by the record. No important issue of law is present, and certiorari ought not be granted merely to retry factual issues decided by a jury.

CONCLUSION

For the reasons stated above, Adeline Bruno requests that petitioners' petition for a writ of certiorari be denied.

Respectfully submitted,

GEOFFREY B. GOMPERS
Attorney for Respondent

No. 89-857

Supreme Court, U.S.
FILED
JAN 16 1990
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

W.B. SAUNDERS COMPANY and CBS EDUCATIONAL AND PROFESSIONAL PUBLISHING, a Division of CBS Inc.,

Petitioners,

v.

ADELINE M. BRUNO,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

JOHN J. MCALEESE, JR.*
JOHN H. WIDMAN
Suite 240—Executive Terrace
455 South Gulph Road
King of Prussia, PA 19406
(215) 337-4510

Attorneys for Petitioners

MCALEESE, MCGOLDRICK & SUSANIN, P.C.
Suite 240—Executive Terrace
455 South Gulph Road
King of Prussia, PA 19406
(215) 337-4510

Of Counsel

* *Counsel of Record for Petitioners*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-857

W.B. SAUNDERS COMPANY and CBS EDUCATIONAL AND PROFESSIONAL PUBLISHING, a Division of CBS Inc.,

Petitioners,

v.

ADELINE M. BRUNO,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I.

INTRODUCTION

This reply addresses only arguments made in respondent's brief in opposition to the petition for certiorari concerning question I of that petition. After a review of respondent's arguments in respect of questions II and III of the petition, petitioners have concluded that a reply to those arguments is unnecessary.

II.

THE RECORD IN THIS CASE AND THE OPINION OF THE COURT BELOW SQUARELY PRESENT QUESTION I OF THE CERTIORARI PETITION FOR RESOLUTION BY THIS COURT

Unassailably, the opinion of the court below declares the law of the Third Circuit to be that whenever an employer prefers a person younger than 40 over a person who is 40 or over, an inference of age discrimination is permissible. The opinion of the court below on this issue is unequivocal:

> This case presents the more common type of discrimination case where the plaintiff is within the protected class and the person ultimately chosen for the job is not. In title VII cases of race or sex discrimination, from which our method of analyzing age discrimination claims has been transplanted, this would be enough to support an inference of discrimination. (citations omitted). *So it is in actions under the ADEA. Maxfield* did not disturb the settled rule that *more favorable treatment for those not within the protected class will support an inference of age discrimination.*[1] (A-9)[2] (emphasis supplied).

The opinion of the court below similarly does not equivocate when it declares that a plaintiff who has satisifed this *de minimis* burden can sustain an ADEA verdict merely by pointing to evidence unrelated to age which attacks the credibility of the employer's explanation. (A-11) ("If a 'legitimate, non-discriminatory' reason articulated by a defendant faced with a *prima facie* case of discrimination is not

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[1] In a BNA Special Report published two days before the petition for certiorari was filed in this case, the authors of that report concluded that the holding of the court below in this case "limited the sufficient-age-difference rule of *Maxfield* to the situation in which the plaintiff and the successful job applicant are both in the protected-age class." S. Rappoport, *Age Discrimination: A Legal And Practical Guide For Employers* 241 (BNA 1989) (hereinafter referred to as "BNA Special Report").

[2] References to pages of the appendix to the certiorari petition shall be designated as: "(A-____)." References to the joint appendix filed with the court below shall be designated as: "(Joint Appendix at ____)."

the true reason for a failure to hire, the court may infer that the actual reason was impermissible."). In this regard, the court sustained Bruno's verdict solely upon evidence which, in its view, tended to discredit Degutis' explanation that he perceived Bruno's attitude to be half-hearted and that Dietrich proved herself to be fully qualified for the Clinics job. (A-10 through A-11). By so holding, the court below necessarily concluded that evidence which merely attacks the soundness of an employer's business judgment will support a finding of age discrimination.

Bruno's principal contention respecting question I of the petition is that this case does not present that question because her proof included "ample direct evidence of age bias, as well as . . . a variety of circumstantial, anecdotal and statistical proofs." Respondent's Brief in Opposition at 2. Bruno's contention is without merit. As the examples provided in the note below demonstrate, Bruno has flagrantly and repeatedly misrepresented the record.[3] These unsupported

[3] Bruno's Brief in Opposition reports that "Degutis waited until Bruno was on vacation before posting the job, and then complained at trial of her late application [91]." *Id.* at 7. In fact, the job was posted on December 17, 1984, *Id.* at 7, and Bruno testified that she did not go on vacation until the week following New Year's Day. (Joint Appendix at 125-6).

Bruno's Brief in Opposition reports that Degutis "repeatedly perjured himself on the stand." In particular, Bruno reports that "Degutis first testifed that he *went into* the Clinic department to observe Dietrich 'daily if not every other day' [115]", (emphasis added), but later "confessed that he only went into the Clinics department 'once or twice in the entire time of that interview process' [115-6]." *Id.* at 11 n. 12 and 13. In fact, Degutis testified on direct examination that "[he] simply didn't have the time to go into that department and run it [himself]" but that he met with Dietrich "if not daily, at least every other day through that time period." (Joint Appendix at 100-102). On cross-examination, Degutis' testimony was the same. (Joint Appendix at 115).

Bruno's Brief in Opposition reports that William Wright, who played no role in the challenged decision, stated to Bruno that he too "would have pursued an age discrimination claim," *Id.* at 15, when in fact the statement which Bruno attributed to Wright was: "Off the record, Addie, if I were you, I think I'd've done the same thing, . . . but if you ever repeat that I'll deny it." (Joint Apendix at 635.)

Finally, Bruno's Brief in Opposition reports that Dietrich placed Bud Henry on probation upon learning that he might testify for Bruno and that

(footnote continues on next page)

contentions all were made below, were addressed by petitioners in the court below, and properly were rejected by that court in making its determination as to whether the record is sufficient to sustain the jury's verdict of age discrimination. Those contentions cannot change the immutable language of the opinion below, which is unambiguous in its description of Bruno's evidence of age discrimination.

Clearly, the court below sustained Bruno's verdict solely upon her undisputed proof that she was within the class protected by the ADEA and that the successful applicant (Dietrich) was not, and upon evidence unrelated to age which, in the eyes of the court below, tended to undermine the soundness and fairness of Saunders' selection of Dietrich for that job. (A-7 through A-11). Indeed, despite Bruno's contention that she proved her case with "ample direct evidence of age bias," the thrust of her argument to this Court on the evidence *of record* is that her qualifications for the Clinics job were so far superior to Dietrich's that a legitimate business reason could not have motivated the selection of Dietrich. Respondent's Brief in Opposition at 4-5, 6-7, and 10-11.

In light of the unambiguous language of the opinion below, it is unassailable that the record in this case and the decision of the court below on that record raise the issue set forth in question I of the petition for certiorari, which issue is identical to the issue on which this Court granted certiorari in *Harbison-Walker Refractories, Inc. v. Brieck*, 822 F.2d 52 (3d Cir. 1986), *cert. dismissed*, 109 S. Ct. 546 (1988). This issue is of critical importance to the proper administration

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(footnote continued from previous page)

she extended Henry's probation when the trial was continued. *Id.* at 6 n. 7. In fact, Henry testified that on July 31, 1986, Dietrich placed him on written warning for poor performance, and that on November 6, 1986, Dietrich extended that warning to April, 1987. (Joint Appendix at 756-9.) Henry testified that in April, 1987, Dietrich told him that "she had no difficulty with [him] . . . up until three weeks ago when she first learned that [Henry] was going to testify to her incompetence." (Joint Appendix at 757.) Thus, according to Henry's own testimony, Dietrich placed Henry on probation more than eight months *before* she learned that he would testify and extended that probation more than five months *before* Judge Ditter's April, 1987 decision to continue the May 4, 1987, trial date.

of the ADEA and effectuation of congressional intent. It has become a preeminent concern to employers whenever their employment decision-making involves a member of the class protected by the ADEA. Certainly employers who must litigate ADEA claims in the Third Circuit are justified in their concern, given that the holding of the court below unquestionably converts the trial of such claims into a trial of the employer's business judgment. *See, Bienkowski v American Airlines, Inc.*, 851 F.2d 1503, 1508 n.6 (5th Cir. 1988).

The decision of the court below adds significantly to the confusion, conflict, and disarray of the lower federal courts concerning this fundamental question of federal law. To be sure, the BNA Special Report referred to previously focuses upon the disturbing conflict which exists among the circuits respecting this issue by noting:

> The ability of employees to assert their rights under the [ADEA] may depend on where they live. That disconcerting fact has resulted because the American court system has taken a statute written for nationwide applicability and interpreted it on a regional basis. The law of age discrimination in Philadelphia is not necessarily the law in Chicago, and the law in those two places may differ from that in Atlanta.[4]

BNA Special Report, p. 3.

Bruno's brief in opposition to the petition is conspicuously silent respecting the existence of this conflict.

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[4] In announcing the publication of the Special Report, BNA noted: "Even the basic question of how a prima facie case of age discrimination is defined has resulted in sharp disagreements among the circuits, according to the analysis . . . ." BNA Daily Labor Report, No. 226, November 27, 1989, at A-6.

III.

CONCLUSION

By reading "age" out of the ADEA, the decision of the court below frustrates the intent of that statute. This Court must correct that substantial error and put an end to the discord which exists among the lower federal courts on this issue. The record in this case and the opinion of the court below squarely and honestly present this Court with the opportunity to do so.

Respectfully submitted,

JOHN J. MCALEESE, JR.
JOHN H. WIDMAN
MCALEESE, MCGOLDRICK & SUSANIN, P.C.
Suite 240—Executive Terrace
455 South Gulph Road
King of Prussia, PA 19406
(215) 337-4510

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No. 89-857

IN THE

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OCTOBER TERM, 1989

W.B. SAUNDERS COMPANY AND CBS EDUCATIONAL AND PROFESSIONAL PUBLISHING, a Division of CBS Inc.,

Petitioners,

v.

ADELINE M. BRUNO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, MERCHANTS AND MANUFACTURERS ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHARLES G. BAKALY, JR.
(Counsel of Record)
JEFFREY I. KOHN
O'MELVENY & MYERS
Citicorp Center
153 East 53rd Street
New York, New York
10022-4611
(212) 326-2000

Attorneys for Amicus Curiae, Merchants and Manufacturers Association

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF MERCHANTS AND MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Merchants and Manufacturers Association (the "Association") moves the Court for leave to file the attached brief of amicus curiae in support of the Petition for Writ of Certiorari. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondents was requested but refused.

I.

NATURE OF THE INTEREST OF THE ASSOCIATION.

The Association is a non-profit California corporation. Its purpose is to augment the human resources management of member firms. Over 3,700 companies of varying sizes and industries are members of the Association. The members collectively employ over one million employees.

The general purposes of the Association are, in part, to promote a healthy business and economic environment, to foster meaningful programs for its employer members, and to advance the civic, commercial, and industrial interests of its members. The Association provides consulting and educational services to its membership in connection with personnel and employment relations matters, including employment litigation. From time to time, the Association is asked by its members to provide consulting services and assistance in connection with their compliance with federal and state age discrimination laws.

II.

ISSUES TO BE ADDRESSED BY THE ASSOCIATION.

Because of the aging of the United States population in general, and the workforces of its members in particular, the Association and its members are extremely concerned about the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), and the impact of the ADEA and judicial interpretations of the ADEA on the business decisions of employers. Litigation under the ADEA has exploded in recent years and affects, directly or indirectly, practically all employers in the United States. According to recent statistical data from the General Counsel's Office of the Equal Employment Opportunity Commission ("EEOC"), between 1983 and 1988, an average of almost 13,000 ADEA charges were filed each year with the EEOC. Between 1985 and 1988, an

average of 95 federal ADEA lawsuits were commenced each year. Preliminary figures for 1989 show 133 new ADEA lawsuits have been commenced, a record high.

The Association's interest in this Petition concerns the far-reaching and potentially devastating impact of one such judicial interpretation of the ADEA on its members. The Third Circuit's opinion is the most troubling decision under the ADEA in recent years. The court below upheld a jury verdict based solely on the difference in the ages of comparable employees and evidence which merely questioned the employer's nondiscriminatory explanation for selecting another employee not in the protected class. The court below also admitted into evidence statistical comparisons of the ages of the employer's workforce which failed to account for the minimum objective qualifications of the job positions studied. In addition, the court below found that an employee's refusal of an unconditional job offer of substantially equivalent employment was insufficient to toll an employer's backpay liability.

If left standing, the decision of the court below will endorse findings of age discrimination under the ADEA where there is no evidence that the challenged employment decision was in fact motivated by an intent to discriminate. In effect, the decision of the court below leaves employers exposed to judicial second-guessing of their business judgment and permits a finding of an ADEA violation if a jury concludes that the employer's business judgment may have been mistaken. The opinion of the Third Circuit also threatens employers with the unbridled use of meaningless, highly prejudicial statistical comparisons in individual disparate treatment cases, even though such "evidence" is barred as a matter of law in class action disparate impact and disparate treatment cases under the ADEA. Finally, the Third Circuit's opinion is a ringing endorsement for employment discrimination plaintiffs to reject unconditional offers of substantially equivalent employment.

The Association's brief examines the widespread conflict among the federal circuit courts of appeals in ADEA cases,

the failure of the court below to adhere to this Court's authority, and the significant impact of the decision on employers.

The Association submits that its experience in employment-related matters, its large employer-group membership, and its amicus curiae appearances in other forums, gives it the ability to focus on the long-term impact of the decision below on the Association's members as well as all employers in the United States. The Association is in a unique position to develop more fully the consequences of the lower court's decision on large and small employers alike.

For the foregoing reasons, the Court should grant this Motion for Leave to File Brief of Amicus Curiae in Support of Petition for Writ of Certiorari.

Dated: December 28, 1989.

Respectfully submitted,

CHARLES G. BAKALY, JR.
(Counsel of Record)
JEFFREY I. KOHN
O'MELVENY & MYERS
Citicorp Center
153 East 53rd Street
New York, New York 10022-4611
(212) 326-2000

Attorneys for Amicus Curiae, Merchants and Manufacturers Association

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BRIEF OF AMICUS CURIAE, MERCHANTS AND MANUFACTURERS ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DESCRIPTION OF INTEREST OF AMICUS CURIAE

The Merchants and Manufacturers Association (the "Association") adopts the statement made in the Motion for Leave to File Brief, immediately preceding this brief, as the description of the interest of amicus curiae.

CONSENT OF PARTIES

Respondent to this action refused consent to the filing of this brief by the Association. The petitioners have consented to the filing of this brief and such written consent will be filed concurrently.

STATEMENT OF THE CASE

The Association adopts the Statement of the Case set forth in the Petition for Writ of Certiorari as well as petitioners' description of the Opinions in the Courts Below, Jurisdiction of this Court, Statutory Provisions Involved, and the Questions Presented for Review.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT AND CONFUSION AMONG THE CIRCUITS REGARDING A SUBSTANTIAL QUESTION UNDER THE ADEA: WHETHER AN ADEA PLAINTIFF CAN PREVAIL ON THE BASIS OF A BARE-BONES PRIMA FACIE CASE COMBINED WITH SOME EVIDENCE ATTACKING THE EMPLOYER'S ARTICULATED BUSINESS REASON.

This Court has issued only seven rulings on any aspect of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 623-634 (1982).[1] It has never inter-

[1] *Hoffman-La Roche Inc. v. Sperling*, 58 U.S.L.W. 4072 (U.S. Dec. 11, 1989); *Public Employees Retirement Sys. of Ohio v. Betts*, 109 S. Ct. 2854 (1989); *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *Lorillard v. Pons*, 434 U.S. 575 (1978); *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977).

preted the shifting evidentiary burdens of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), in the context of the ADEA. This case presents the perfect opportunity to do so while at the same time resolving a question that has left the circuits in conflict: if an employer favors a person under 40 over an ADEA plaintiff who is 40 or older, will merely questioning the business judgment of the employer always support a finding of intentional discrimination in violation of the ADEA?

In a decision at odds with the law of other circuit courts of appeals and this Court's case authority, the court below, by a 2-1 majority with Judge Greenberg dissenting, upheld a jury verdict based on the bare statistic of the ages of comparable employees (46 and 36) competing for the same position and on evidence unrelated to the ages of the candidates which the court below believed was sufficient to question Saunders' nondiscriminatory explanation for selecting a younger applicant to fill the position instead of respondent. *Bruno v. W.B. Saunders Co.,* 882 F.2d 760, 766 (3d Cir. 1989). The court below held that where the employer's legitimate, nondiscriminatory reason for hiring a person under 40 instead of a person who is 40 or older may not be "the true reason . . . , the court may infer that the actual reason was impermissible." *Id.*

The decision of the court below is in conflict with other federal circuits and exceeds any reasonable interpretation of the ADEA by misapplying this Court's decisions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983). Taken to its logical conclusion, the court's analysis sanctions the judicial second-guessing of an employer's subjective business judgment and permits a jury to find intentional age discrimination solely on the basis that the employer's judgment may be mistaken and not, as required by this Court's authority in employment discrimination cases, including *Aikens*, that age was a determining factor in the employment decision. If left standing, the Third Circuit's decision is a dangerous precedent for employers since it transforms the ADEA into a vehicle which attacks the employ-

er's business judgment rather than focusing the inquiry on whether age discrimination affected the employer's judgment.

A. The Decision Below Conflicts With Decisions Of Other Circuit Courts Of Appeals.

The circuit courts of appeals have reached directly conflicting answers to the question of whether an ADEA plaintiff can prevail on the basis of a bare-bones prima facie case combined with some evidence attacking the employer's business judgment. The First, Fifth, and Ninth Circuits reject the Third Circuit's adaptation of *McDonnell Douglas* to ADEA cases, while the Seventh, Eighth, Eleventh, and D.C. Circuits agree with the Third Circuit's reasoning.

The First Circuit, in *Menard v. First Sec. Serv. Corp.*, 848 F.2d 281 (1st Cir. 1988), concluded that even if the plaintiff had demonstrated a prima facie case, the evidence offered by him merely disputed the correctness of the employer's business judgment and therefore did not show the reason for his discharge to be a pretext for age discrimination. *Id.* at 287. The court commented that once the employer satisfied its burden of producing a nondiscriminatory explanation, the effects of the prima facie case are dispelled and the "plaintiff has the burden of proving by a preponderance of the evidence that the defendant's articulated reason was pretextual, and *the real reason for discharge was age discrimination.*" *Id.* (emphasis added); *see also Dea v. Look*, 810 F.2d 12, 15 (1st Cir. 1987) ("[plaintiff] cannot meet his burden of proving 'pretext' simply by refuting or questioning the defendant's articulated reason"). Similarly, the Fifth Circuit, in *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988), expressly rejected the Third Circuit's adaptation of *McDonnell Douglas* to ADEA cases and criticized the approach since it allowed plaintiff to prevail without offering any evidence that age motivated the employer's decision. *Id.* at 1508 & n.6.

The view expressed by the Ninth Circuit in *Douglas v. Anderson*, 656 F.2d 528 (9th Cir. 1981), is also at odds with that of the Third Circuit. In that case, the employer showed that the plaintiff was terminated because of the plaintiff's

financial mismanagement of the employer's bookstore. The plaintiff argued that the real reason for his discharge was his criticism of certain financial transactions conducted by the employer which the plaintiff discovered. The court concluded that this evidence does not show that the employer's proffered reason is a pretext for discrimination, "but merely presents an alternative reason not based on age." *Id.* at 534. As the Ninth Circuit explained, "[t]he reason for a business decision need not meet the unqualified approval of the judge or jury, so long as it is not based on age." *Id.*

The Seventh, Eighth, Eleventh, and D.C. Circuits agree with the Third Circuit, however, and equate the discrediting of the employer's business judgment with the ultimate issue that age was a determining factor. The Seventh Circuit, in *La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405 (7th Cir. 1984), has declared that while age must be a determining factor, plaintiff could prevail using the *McDonnell Douglas* framework "without presenting *any* evidence that age was a determining factor in the employer's motivation." *Id.* at 1409-10. The court concluded that the indirect method of proof permits a finding of age discrimination based on the elimination of all nondiscriminatory motivations as the reason for the employment decision. *Id.* at 1410. The Eighth Circuit, in *Brooks v. Woodline Motor Freight, Inc.*, 652 F.2d 1061 (8th Cir. 1988), upheld a jury verdict against an employer because the plaintiff established a prima facie case and offered evidence discrediting his employer's explanation. *Id.* at 1064. Similarly, the Eleventh Circuit, in *Stanfield v. Answering Serv., Inc.*, 867 F.2d 1290 (11th Cir. 1989), upheld a jury verdict based on a prima facie case and the *lack of evidence supporting* the employer's legitimate business reason. *Id.* at 1294.

The D.C. Circuit has also argued that an ADEA plaintiff, in certain cases, can prevail solely on the strength of his or her prima facie case coupled with a rebuttal of the employer's explanation. *Krodel v. Young*, 748 F.2d 701, 707-08 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985). However, the court acknowledged that it was not squarely presented with the issue, since the plaintiff offered additional evidence by

which discrimination could be inferred, including a finding that an administrator expressed a preference for younger workers. *Id.*

The circuits also directly disagree as to whether an ADEA plaintiff can avoid summary judgment by asserting that, at trial, he will demonstrate that the employer's stated explanation for its conduct was untrue. The Third Circuit takes the position that an employer's summary judgment motion is to be denied if the plaintiff presents evidence sufficient to show that the employer's proffered explanation may be untrue. It assumes that such a showing resuscitates the prima facie case's presumption of discrimination. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 898 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987). The Ninth Circuit, however, requires that a plaintiff's proof of pretext demonstrates that his age and not the reason offered by the employer motivated the challenged decision. The Ninth Circuit assumes that the prima facie case cannot be revived once the employer rebuts it. *Steckl v. Motorola, Inc.*, 703 F.2d 392, 392-93 (9th Cir. 1983); *see also Menzel v. Western Auto Supply*, 848 F.2d 327, 330 (1st Cir. 1988) (merely casting doubt on the employer's articulated reasons for discharge is insufficient to overcome summary judgment); *Goldberg v. B. Green & Co.*, 836 F.2d 845, 849 (4th Cir. 1988) ("[plaintiff] cannot avoid summary judgment in this case simply by refuting [the employer's] non-age-related reasons for firing him").

In short, the circuit courts have reached directly conflicting answers to the question of whether an ADEA plaintiff can prevail merely by questioning the business judgment of the employer when the employer favors a person under 40 over the plaintiff who is 40 or older. This Court should take this opportunity to resolve the confusion in the circuits by granting certiorari.

B. The Decision Below Conflicts With Decisions Of This Court.

The decision of the court below also misapplies this Court's decisions in *McDonnell Douglas*, *Burdine* and *Aikens*. The court below permits the trial of the employer's business

judgment rather than adhering to the central inquiry in an employment discrimination case: whether the employer's decision was motivated by age.

As this Court has repeatedly cautioned, the shifting burdens of the *McDonnell Douglas-Burdine* formulation are designed to aid the courts and the litigants in the orderly consideration of relevant evidence. *Burdine*, 450 U.S. at 255 n.8. In *Aikens*, this Court warned that district courts should not lose sight of the ultimate issue in a discrimination case: whether the plaintiff sustained his burden of proving that the employer intentionally discriminated against him. 460 U.S. at 715; *see also Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2784 (1988). Thus, while *Burdine* and *Aikens* make clear that a plaintiff can rely upon indirect evidence that the employer's reason is "unworthy of credence", such indirect evidence must be sufficiently probative of the ultimate issue in the case: that discriminatory conduct is a *determining factor* in an employer's business decision. 460 U.S. at 715; 450 U.S. at 253.

In the court below, respondent sought to prove the ultimate issue of the case merely by attacking the observations and explanations of petitioner Saunders' decisionmaker who had selected another candidate for the Manager's position of the Clinics Fulfillment Department, and not, as compelled by *Aikens*, by showing that there was a causal connection between respondent's age and the alleged discriminatory act. Respondent demonstrated only that (i) she was one of nine Saunders' employees applying for the job, (ii) she was 46 years old while the ages of the other applicants were 24, 25, 26, 36, 40, 41, 48, and 49, (iii) Saunders selected Beverly Dietrich (age 36) for the position, (iv) the Saunders' decisionmaker may have been mistaken when he perceived respondent's attitude for the new job to be half-hearted, and (v) Dietrich, who served as acting Manager temporarily prior to the selection, was criticized by two fellow employees for her performance. By simply attacking the decisionmaker's subjective assessment and explanations, respondent failed to forge the critical link between her not being chosen for the

Manager's position of the Clinics Fulfillment Department and her age.

By sanctioning this interpretation of *McDonnell Douglas* in ADEA cases, the court below contradicts this Court's admonition in *Aikens* always to be mindful that the central question is whether plaintiff has presented sufficient evidence to permit a reasonable fact-finder to conclude that age was a determining factor in the employer's decision. *See Aikens*, 460 U.S. at 715. In contrast, other circuits have allowed a jury to infer that the employer's articulated reasons were a pretext for age discrimination and, therefore, that age was a determining factor in a business decision from indirect evidence that management personnel made repeated negative comments directly related to age, *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529-30 (11th Cir. 1987), or that reliable and probative statistics demonstrated a pattern of adverse treatment of older workers, *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1342 (1st Cir. 1988). The court below failed to rely on any additional evidence demonstrating a causal connection between the employment decision and respondent's age.

Thus, the court below ignored this Court's words of caution by permitting a jury to second-guess the employer's explanation without a showing by an employee that the employer's explanation was a pretext for age discrimination.

C. The Decision Below Presents Important Issues Of Federal Law.

Last term, this Court granted *certiorari* to the Third Circuit in *Harbison-Walker Refractories v. Brieck*, 822 F.2d 52 (3d Cir. 1986), *cert. granted*, 485 U.S. 958, *cert. dismissed as improvidently granted*, 109 S. Ct. 546 (1988) (White, J., dissenting), to explore the applicability of *McDonnell Douglas* to cases under the ADEA, and specifically to explore the nature and significance of the first stage (the prima facie case) and the third stage (pretext) of that proof scheme. The Court considered the following question: "Whether a plaintiff who alleges intentional discrimination can survive summary judgment by questioning his employer's business judgment,

without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate?" Brief for Petitioner Harbison-Walker at (i). This Court dismissed the petition as improvidently granted after oral argument without making a ruling. 109 S. Ct. 546. Consequently, the debate has continued without any definitive ruling.

This case raises the identical issue that this Court wished to consider in *Harbison-Walker*. Moreover, unlike *Harbison-Walker*, this case comes to the Court with a complete factual record following a jury trial. Therefore, by granting the Petition, this Court will have an opportunity to address on a complete record the question of how, if at all, *McDonnell Douglas* should be applied to the ADEA, a question of vital importance as to which the circuits continue to be in hopeless conflict and confusion.

The question is also of critical importance to the administration of the ADEA and its impact on employers. Reduced to its core, the decision of the court below permits an ADEA plaintiff to prevail at trial without producing any direct or indirect evidence linking a challenged employment decision to age discrimination. The court below applied a standard that reads age out of the well-established analytical framework for discrimination cases by allowing an ADEA plaintiff to prevail upon showing that the employer's explanation may have been mistaken or untrue.[2] For respondent to prove that Saunders' explanation is a pretext for *age discrimination* is one thing. To show that Saunders' decisionmaker is mistaken or his reasoning faulty is something entirely different. It does not follow that the real reason for an employee's non-selection for a position is age discrimination simply because the jury disagrees with and therefore discredits the employer's articulated reason. The employer's decisionmaker may have made a mistake in selecting the right person to fill a position; the

[2] In effect, the decision of the court below requires that an employer prove the absence of a discriminatory motive. This Court has rejected any such interpretation of the *McDonnell Douglas* analytical framework. *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978).

decisionmaker's assessment may have been incorrect because the information provided to him was incomplete; or the employer may have had another nondiscriminatory explanation that it did not wish to tell the employee. This is a far cry from proof of a pretext for age discrimination.

The decision of the court below is especially problematic in ADEA cases since age, unlike race, sex, and national origin, is not an immutable characteristic. Given the natural progression of age, a discharged or non-selected employee will more often than not be replaced by a younger employee. *See Laugesen v. Anaconda Co.*, 510 F.2d 307, 312-13 n.4 (6th Cir. 1975). Therefore, in an ADEA action, a prima facie case will be rather simple to demonstrate under the Third Circuit's analysis, assuming a plaintiff is otherwise qualified to hold a position.[3] The decision of the court below then permits an ADEA plaintiff to prevail based on this simple, bare-bones prima facie case and evidence that the employer may have been mistaken in its business judgment. This cannot be a reasonable interpretation of the ADEA. Indeed, Congress never intended the ADEA to promote truthful explanations or perfect business decisions. The ADEA only requires the intervention of the courts where age is a determining factor in an employment decision.

Therefore, this substantial question of federal law under the ADEA must be resolved by this Court.

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[3] Furthermore, given that age is mutable, the mere selection of a younger employee is not sufficient evidence that age played a role in the employment decision. *See, e.g., Maxfield v. Sinclair Int'l*, 766 F.2d 788 (3d Cir. 1985) (replacement by someone younger does not by itself give rise to an inference of age discrimination). The ADEA does not lend itself to such a brightline rule and in this respect differs from a race or sex discrimination case in which replacement by an employee outside the protected category may very well be a convenient proof guideline. Consequently, the nature and significance of a prima facie case under the ADEA remains unsettled.

II.

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT AND CONFUSION AMONG THE CIRCUITS REGARDING THE USE OF STATISTICAL EVIDENCE IN AN ADEA DISPARATE TREATMENT CASE.

The court below upheld the trial court's decision to admit into evidence respondent's plainly irrelevant statistical analyses of various employment decisions. 882 F.2d at 766-67. Specifically, the trial court allowed the jury to consider respondent's anecdotal statistical comparisons of the ages of (i) Saunders' new hires and all its salaried employees, (ii) Saunders' new hires and all its employees, (iii) Saunders' terminated employees and all its employees, (iv) Saunders' transferred employees and its terminated employees, (v) Saunders' promoted employees and all its employees, and (vi) Saunders' laid-off employees and its retained employees. These raw statistical comparisons indisputably failed to take into account the minimum objective qualifications for the positions studied. *Id.* at 767. Indeed, the majority opinion of the court concedes that the respondent's studies "are significantly less probative than they would be if they took account of the minimum qualifications of the jobs into which promotion or transfer occurred." *Id.* Despite this glaring defect, the court below concluded that respondent's statistics were " 'relevant' ", even though such comparisons would be given no weight in a class action disparate impact or treatment case. *Id.* Following on the heals of this Court's decision in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), the decision of the court below conflicts with other circuit courts of appeals and is particularly troubling since it allows a jury in an ADEA case, rather than a judge, to consider and evaluate the relevance of meaningless statistical comparisons.

A. The Decision Below Conflicts With Decisions Of Other Circuit Courts Of Appeals.

The Sixth and Seventh Circuits specifically disagree with the Third Circuit's holding that the statistical studies in question should be admitted into evidence in ADEA disparate

treatment cases. In *Simpson v. Midland-Ross Corp.*, 823 F.2d 937 (6th Cir. 1987), plaintiff offered similar statistical studies. The court observed that not only had plaintiff failed to provide the "relative qualifications of those hired and the positions to which they were assigned," but also "neglect[ed] vital information regarding the pool of applicants and whether, for example, qualified older employees were available or applied for those jobs." *Id.* at 943. The court commented:

> Unless the statistics, standing alone or in comparison, are sufficient to lead the mind naturally to the conclusion sought, they have no probative value; they do not move the proof one way or another. . . . . . The facts cited by [the plaintiff] do not tell us anything about age other than that some people were of various ages, facts that in themselves are meaningless. . . . Statistics such as those offered may be interesting perhaps, but are fundamentally irrelevant to an age discrimination claim.

Id. at 944.

Similarly, the Seventh Circuit, in *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (7th Cir. 1989), held that plaintiff failed to produce sufficient evidence—including sufficient statistical studies—to suggest that defendant's proffered reasons were a pretext for age discrimination in order to survive summary judgment. *Id.* at 1331-32. Plaintiff offered evidence tending to show that defendant hired 106 new employees (only 9 of whom were over 40). The court concluded that plaintiff's bare statistical showing was meaningless. "[I]n the absence of evidence regarding the qualified potential applicants from the relevant labor market, we find [plaintiff's] statistics fail in any way to show discrimination." *Id.* at 1321.

Contrary to the decisions of the Sixth and Seventh Circuits, the D.C. Circuit Court of Appeals has agreed with the Third Circuit that statistical studies in individual disparate treatment cases do not have to measure up to the standards for admissibility of statistics in class action disparate impact or treatment cases. *See Krodel v. Young*, 748

F.2d 701 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985). The D.C. Circuit noted that although the statistical comparisons in an ADEA failure to promote case were " 'broad and tentative,' . . . 'the simple percentage comparisons are not so simplistic as to lack meaning.' " *Id.* at 710 (quoting *Krodel v. Young*, Civ. No. 80-3183, slip op. at 39 n.3 (Feb. 9, 1983)). The court concluded that "a trial judge should be allowed to consider a disparate treatment plaintiff's statistics and to judge for herself their meaningfulness to the question of discriminatory intent." 748 F.2d at 710.[4]

This Court has never directly addressed the precision with which an individual disparate treatment plaintiff must present statistical evidence in an ADEA case. This case presents the opportunity to resolve confusion in the circuit courts and provide the courts with much needed guidance on the use of statistical evidence in the increasing numbers of ADEA cases.

B. The Decision Below Conflicts With Decisions Of This Court.

As this Court has recognized, statistical evidence plays an important role in employment discrimination litigation. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). While endorsing the use of statistical proof and noting that statistical analyses will continue to serve an important role in uncovering clandestine and covert discrimination, *id.*, this Court has cautioned that

> [s]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they

[4] Other federal courts have also admitted seemingly questionable statistical evidence in Title VII and ADEA cases. *See Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1104 (8th Cir. 1988) (while the parties disputed the significance of the labor market and hiring data, the court observed that "[t]he jury should have been allowed to consider [plaintiff's] workforce evidence and sort out the parties' conflicting explanations of its significance"); *Beck v. Quiktrip Corp.*, 708 F.2d 532, 535 (10th Cir. 1983) ("statistical evidence which alone might be insufficient to establish a prima facie case of discrimination or to discredit an employer's proffered reason for its action is not necessarily irrelevant") (citing *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 954-55 (10th Cir. 1980)).

> may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

Id. at 340.

Thus, this Court's decisions have stressed the cautious approach lower federal courts should take to statistical analyses as proof of discrimination. In *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974), this Court described as "meaningless" racial composition comparisons of a selection process for school board members which incorrectly assumed that "all citizens are fungible" for purposes of determining the pool of candidates for the positions at issue. *Id.* at 620-21. The Court noted that statistics which fail to control for special qualifications for the positions studied are "too fragmentary and speculative to support a serious charge [of discrimination] in a judicial proceeding." *Id.* at 621.

In *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), the Court noted that " 'the proper comparison' " in statistical analyses of employment discrimination " '[is] between the racial composition of the *qualified . . . population in the relevant labor market.*' " *Id.* at 2121 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977)) (emphasis added). Because plaintiff's statistics failed to account for the minimum objective qualifications for the at-issue jobs, this Court concluded that the studies were "nonsensical." 109 S. Ct. at 2122.

Also in 1989, this Court, in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), cautioned:

> In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's workforce to the racial composition of the relevant population may be probative of a pattern of discrimination. . . . But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion *must* be the number of minorities qualified to undertake the particular task.

Id. at 725 (citations omitted).

Use of statistics in both Title VII and ADEA cases requires, at the outset, a determination of who should be included in the relevant population studied. If an employment opportunity requires special skills, education, or experience, the relevant population must be restricted to include only those members of the community who possess these qualifications. *See Hazelwood*, 433 U.S. at 308 n.13. If the issue concerns promotions, the relevant population is internal to the employer's work force and consists of all persons with the necessary qualifications to perform the at-issue job. *See McIntosh v. Weinberger*, 810 F.2d 1411, 1428 (8th Cir. 1987), *vacated on other grounds*, 108 S. Ct. 2861 (1988).

The court below did not approach statistical evidence in an ADEA disparate treatment case with the same cautionary approach demanded by this Court's decisions. The court below expressly rejected the rule that statistical evidence account for minimum objective qualifications, saying such a rule would not be "broadly useful." 882 F.2d at 767. The Third Circuit accepted without question the statistical analyses of respondent's expert witness and noted that in individual disparate treatment cases, statistical evidence need not be so finely tuned. *Id.* While acknowledging that the studies were "significantly less probative" than they would have been had they taken into account the minimum objective qualifications of the at-issue jobs, the court concluded that such flawed statistical studies were nevertheless " 'relevant.' " *Id.*[5]

The decision of the court below is troubling because it involved a disparate treatment case where the role of statistics should necessarily be a limited one, as the ultimate issue in such cases is whether the particular ADEA plaintiff, and not an entire class, was the victim of an illegally motivated

[5] While this Court has observed that the failure to include certain variables in a multiple regression analysis may affect its probativeness, not its admissibility, *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), it has also noted "[t]here may, of course, be some regressions so incomplete as to be inadmissible as irrelevant . . ." *Id.* at 400 n.10. The respondent's incomplete statistical studies must also be so categorized.

decision.[6] Furthermore, courts must be even more critical of statistical analyses in ADEA cases than in Title VII cases because of the identity of the factfinder. In Title VII cases, the judge, who is also the factfinder, can simply reject meaningless statistical studies as not being probative of the issue in the case. *See, e.g., Frazier v. Consolidated Rail Corp.*, 851 F.2d 1447, 1454 (D.C. Cir. 1988) (plaintiffs' statistical evidence did not permit a "meaningful comparison in support of the plaintiffs' prima facie case"). In an ADEA case, by contrast, the jury is given the critical task of deciding the dispositive issue of whether age is a determining factor in an employer's decision. It should not also have the complicated function of a trial judge of evaluating the relevance of otherwise meaningless statistical studies. The court below asked the jury to make both factual findings and legal determinations of relevance by determining whether respondent's statistical studies were devoid of probative value. As the dissenting judge noted in the court below, "the district court wrongfully relinquished its function as the judge of the law, which includes the obligation to pass on the admissibility of [statistical] evidence, to the jury." 882 F.2d at 775.

In short, the Third Circuit has not only issued a "circuit splitting" decision, but its sanctioning of meaningless statistical evidence seriously ignores this Court's authority. This Court should therefore grant the Petition to clarify the Third Circuit's misconception that an ADEA individual disparate treatment case should be treated differently from a class action disparate impact or treatment case.

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[6] In Title VII disparate treatment cases, the federal courts have followed such a cautionary approach to statistical evidence. *See, e.g., Lamphere v. Brown Univ.*, 685 F.2d 743, 759-50 (1st Cir. 1982) (per curiam) (in a sex discrimination case, numerical disparity of men and women in a particular job category was not probative since plaintiff's studies failed to provide statistics as to the number of qualified women in the relevant labor pool).

III.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT BELOW CIRCUMVENTED THIS COURT'S DECISION IN *FORD MOTOR CO. V. EEOC* WHEN IT HELD THAT A WRITTEN UNCONDITIONAL OFFER OF A SUPERIOR OR A SUBSTANTIALLY EQUIVALENT JOB DID NOT TOLL THE ACCRUAL OF BACK PAY LIABILITY.

In *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), this Court declared that the preferred means of encouraging the end of employment discrimination in the workplace is through " 'voluntary compliance.' " *Id.* at 228 (citation omitted). To accomplish the objective of bringing an end to employment discrimination, this Court adopted rules to encourage employers "promptly to make curative, unconditional job offers to . . . claimants, thereby bringing defendants into 'voluntary compliance' and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace." *Id.* The Court held therefore that "absent special circumstances," an employee forfeits the right to back pay if he rejects an unconditional job offer of substantially equivalent employment. *Id.* at 241.

Several months after the selection of Ms. Dietrich for the Manager's position, respondent was offered the position of Manager of Inventory Planning and Control at Saunders' Bellmawr, New Jersey facility. 882 F.2d at 763. Respondent testified that in a conversation with her immediate superior she had been told that it was expected she would drop her EEOC claim. *Id.* at 770. After rejecting the job, respondent received a written memorandum, at a time when she still could have taken the job, saying "[t]he Bellmawr job offer is not, and never was, conditional on dropping your claim." *Id.* Although the written offer expressly repudiated any notion that respondent's acceptance of the job was conditioned upon the dismissal of her claim, respondent decided not to accept the unconditional offer of a substantially similar position. *Id.*

The court below held that respondent's subjective fear of retaliation, supported only by an earlier seemingly condi-

tional offer of the same job, is sufficient to justify her rejection of the unconditional offer. *Id.* at 770-71. The court below dismissed the evidence of the written memorandum saying that the written confirming memorandum "merely present[ed] a question of credibility." *Id.* at 770. In reaching this conclusion, the court below misapplied *Ford Motor* and created a new standard never before adopted by this Court or any of the other circuit courts of appeals which have applied *Ford Motor.*

This Court and lower federal courts have held that a plaintiff might reject an unconditional job offer in "exceptional circumstances." In *Ford Motor,* this Court gave the example of a plaintiff having to relocate a great distance as an "exceptional circumstance" meriting rejection of an unconditional job offer. *Id.* at 238 n.27. Other federal courts have viewed the "exceptional circumstances" standard narrowly and have generally applied it to situations where a plaintiff is placed in a position of evaluating the transactional costs against the benefit of the offer. *See, e.g., Orzel v. City of Wauwatosa Fire Dep't,* 697 F.2d 743, 757 (7th Cir.), *cert. denied,* 464 U.S. 922 (1983) (claimant's refusal of offer conditioned on taking and passing a physical examination arranged by employer did not toll back pay period).

Before the decision of the court below, no court, to the Association's knowledge, has permitted a plaintiff to reject an unconditional offer of a substantially equivalent job on the sole basis of having received a prior conditional offer requesting the plaintiff drop her claim. Indeed, such a result cannot be squared with this Court's admonition that employers take prompt corrective action and that victims of discrimination minimize their damages by accepting an unconditional job offer of a substantially equivalent job.

Indeed, assuming any condition is initially imposed on the job offer, employers must be allowed to remove such a condition if the principles of *Ford Motor* are to be given any effect. Surely, if the original job offer is vague, indefinite, or somehow qualified, an employer must be allowed to take corrective action to make the job offer definitive and uncondi-

tional. The same reasoning must hold true where the offer is at first conditioned on the respondent dropping her claim.

When faced with an ADEA or Title VII action, or a threat of such litigation, employers may first try to resolve the dispute by making a job offer which is conditioned upon the settlement of the dispute. If such an attempt is initially unsuccessful, an employer should not be denied the opportunity to take corrective action under *Ford Motor* by making an unconditional job offer. However, under the Third Circuit's reasoning, an employer may very well be jeopardizing its right to take corrective action under *Ford Motor* if it first proceeds to try to settle the dispute. This Court never intended such a result when it announced its decision in *Ford Motor.*

Moreover, the policy underlying *Ford Motor* must be against permitting the rejection of a substantially equivalent job based only upon a subjective fear of retaliation. Indeed, numerous cases make it clear that "exceptional circumstances" are not present because of hurt feelings, suspicions that the job offer was not bona fide, or a desire not to work for the supervisor who discharged the employee. *E.g., Giandonato v. Sybron Corp.*, 804 F.2d 120, 124 (10th Cir. 1986) (plaintiff "did not comply with *Ford Motor Co.'s* mandate of minimizing his damages by refusing his employer's offer of reinstatement [because of his] desire not to work under [his former supervisor]"); *Cowen v. Standard Brands, Inc.*, 572 F. Supp. 1576, 1581 (N.D. Ala. 1983) (plaintiff cannot turn down job because "feelings were hurt and . . . he did not feel the offer was bona fide").

If, as *Ford Motor* holds, an employer can toll back pay liability by unconditionally offering a substantially equivalent job, that employer must, as a matter of law, be permitted to repudiate in writing an alleged condition attached to an earlier offer. Such a result would promote corrective action by employers, the goals of the ADEA, and the goals of *Ford Motor.*

CONCLUSION

For the foregoing reasons, the Association respectfully submits that the decision below conflicts with the decisions of other circuit courts and this Court's authority, that this case presents substantial federal questions for this Court's review, and that, accordingly, this Court should grant the Petition for Writ of Certiorari.

DATED: December 28, 1989

Respectfully submitted,

CHARLES G. BAKALY, JR.
(Counsel of Record)
JEFFREY I. KOHN
O'MELVENY & MYERS
Citicorp Center
153 East 53rd Street
New York, New York 10022-4611
(212) 326-2000

Attorneys for Amicus Curiae, Merchants and Manufacturers Association

PROOF OF SERVICE BY MAIL

STATE OF VIRGINIA
COUNTY OF ARLINGTON } ss.:

I am a citizen of the United States and a resident of the City of Arlington, Virginia, County of Arlington; I am over the age of 18 years and not a party to the within action; my business address is 1101 Wilson Boulevard, Arlington, Virginia 22209.

On December 28, 1989, I served the within Motion for Leave to File Brief and Brief of Amicus Curiae in re: "W.B. Saunders Company and CBS Educational and Professional Publishing, a Division of CBS Inc. v. Adeline M. Bruno" in the United States Supreme Court, October Term 1989, No. 89-857, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Arlington, Virginia addressed as follows:

Edgar Yergeau
CBS INC.
51 West 52nd Street
New York, New York 10019

John J. McAleese, Jr.
John H. Widman
McAleese, McGoldrick & Susanin, P.C.
455 South Gulph Road
Suite 240
King of Prussia, PA 19406

Geoffrey B. Gompers
215 South Broad Street
Suite 900
Philadelphia, PA 19107

All parties required to be served have been served.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on December 28, 1989, at Arlington, Virginia.

_____